Petition

81-1963

No.

Office - Supreme Court, U.S.
FILED
APR 23 1982
ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CITRONELLE-MOBILE GATHERING, INC., *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

1. Whether the United States, as the representative of third persons who themselves have an independent statutory right to sue, may prosecute an action for restitution under section 209 of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. §1904 note, unhindered by any statute of limitation.

2. Whether sales of crude oil to a foreign refiner pursuant to export licenses issued by the Department of Commerce are "export sales" within the meaning of federal regulations exempting such sales from price controls. [1]

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[1] If the Court answers both questions adversely to petitioners, it should further consider whether a court may require payment of the amount of alleged overcharges into escrow before determination of the identity of injured third persons, if any, and the amounts of restitution to which such third persons will be entitled.

PARTIES

Petitioners Citronelle-Mobile Gathering, Inc., Citmoco Services, Inc., and Bart B. Chamberlain, Jr., respondent United States of America, and James B. Edwards, Secretary of Energy, Malcolm Baldrige, Secretary of Commerce, and Donald E. Allen, formerly Regional Administrator, Region IV, Federal Energy Administration, were the only parties in the court below.[2]

Bart B. Chamberlain, Jr., is the principal shareholder in Citronelle-Mobile Gathering, Inc., and Citmoco Services, Inc., and also in Douglas Oil Purchasing Co., Inc. Citronelle-Mobile Gathering, Inc., and Citmoco Services, Inc., have no other corporate affiliates.

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[2] This petition seeks review of the judgment of the court of appeals in No. 5-60, which arose on interlocutory appeal from the district court's order granting the United States' motion for summary judgment on its claim for restitution. Although the individual federal officers, in their official capacities, were named as appellees in that appeal, they do not appear to have been parties. They were parties in the appeal in No. 5-61, which was consolidated with No. 5-60. Since this petition does not seek review of the judgment in No. 5-61, those federal officers do not appear to be respondents here.

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Citronelle-Mobile Gathering, Inc., Citmoco Services, Inc., and Bart B. Chamberlain, Jr., hereby petition for a writ of certiorari to review the judgment of the Temporary Emergency Court of Appeals in this case.[3]

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 669 F.2d 717 (TECA 1982). The opinion of the district court (App. B, *infra*) is reported at 499 F. Supp. 871 (S.D. Ala. 1980).[4]

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[3] "Petitioners" will be used herein to refer to any or all of the petitioners.

[4] The district court's order on rehearing (App. C, *infra*), its earlier opinion on the enforcement of administrative subpoenas (App. D, *infra*), and its separate opinions on the issue of recusal (App. E and F, *infra*) from which the appeal in No. 5-61 was taken, are not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1982.[5] The court's order denying rehearing with suggestion of rehearing *en banc* (App. G, *infra*) was entered on March 26, 1982. This Court's jurisdiction is invoked under section 211(g) of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 note, and 28 U.S.C. § 1254(1).

STATUTE AND REGULATION INVOLVED

Section 209 of the Economic Stabilization Act of 1970, as amended, provides:

> Whenever it appears to any person authorized by the President to exercise authority under this title that any individual or organization has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any order or regulation under this title, such person may request the Attorney General to bring an action in the appropriate district court of the United States to enjoin such acts or practices, and upon a proper showing a temporary restraining order or a preliminary or permanent injunction shall be granted without bond. Any such court may also issue mandatory injunctions commanding any person to comply with any such order or regulation. In addition to such injunctive relief, the court may also order restitution of moneys received in violation of any such order or regulation.

10 C.F.R. § 212.53(a), 39 Fed. Reg. 1924, 1952 (Jan. 15, 1974), provided:

> The prices charged for export sales of covered products including sales to a domestic purchaser which certifies the product is for export are exempt.

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[5] The court did not issue a formal judgment separate from its opinion.

STATEMENT

1. From the inception of explicit price controls on crude oil and petroleum products in August, 1973, the regulations provided an exemption for "export sales." 6 C.F.R. § 150.54(d)(1), 38 Fed. Reg. 21592, 21602 (Aug. 9, 1973).[6] Crude oil or petroleum products could only be exported, however, pursuant to export licenses issued by the Department of Commerce, under regulations requiring the exporter to show that the transaction would not "diminish the total quantity or quality of petroleum available to the United States . . . ." 15 C.F.R. § 377.6(b)(3), 38 Fed. Reg. 34442 (Dec. 13, 1973). As a practical matter, therefore, the exemption for export sales was limited to transactions in which the purchaser agreed to import a like quantity of crude oil or petroleum products into the United States.

In late 1973, petitioners, who produced or had access to domestic crude oil, were approached by the operator of an offshore refinery, the Grand Bahamas Petroleum Company ("Petco"), and asked to participate in just such a transaction. App. B, *infra*, p. 27a. Petco offered to purchase approximately one million barrels of crude oil from petitioners and to assist petitioners in obtaining export licenses by agreeing to import a like quantity of refined petroleum products into the United States through its parent, the New England Petroleum Corporation ("Nepco"). *Id.* at 24a. The price Petco proposed to pay was higher than could have been charged in a nonexempt domestic sale but lower than Petco would have been required to pay in the unregulated world market. J.A. 528, 573.[7] *See also Carey* v. *National Oil Corp.*, 453 F. Supp. 1097, 1099-1100 (S.D.N.Y.

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[6] This regulatory exemption was repromulgated as 10 C.F.R. § 212.53(a), 39 Fed. Reg. 1924, 1952 (Jan. 15, 1974), when the responsibility for administering petroleum price controls was transferred from the Cost of Living Council to the Federal Energy Office.

[7] "J.A." refers to the joint appendix filed in the court of appeals.

1978), *aff'd*, 592 F.2d 673 (2d Cir. 1979). Petitioners accepted Petco's offer, subject to issuance of the necessary export licenses and also contingent upon obtaining the opinion of counsel (subsequently obtained) that the sales would be exempt from domestic price controls. J.A. 445.

Petitioners thereupon filed applications for export licenses with the Department of Commerce, fully describing the transactions in all particulars, including price. App. B, *infra*, p. 24a. At the time, a three-agency committee, composed of representatives of the Departments of Commerce and State and the Federal Energy Office ("FEO"), reviewed applications for licenses to export crude oil. J.A. 412. Because petitioners' applications were the first to be filed after the imposition of allocation and price controls, they were carefully scrutinized by FEO, the agency responsible for administering those controls; the applications were reviewed and finally approved not only by a compliance officer but by FEO's General Counsel, by its Assistant Administrator for Operations and Compliance, and by the Administrator himself. *Id.* at 412-13. Upon the representation by the General Counsel that FEO had no legal objection to the proposed sales, the Department of Commerce issued the licenses. *Id.* at 413. Out of concern, however, that the sales might "constitute a precedent for further sizeable exports of crude oil when domestic refineries are operating at 76% of full capacity," *id.* at 576, the Department of Commerce promptly amended its regulations prospectively to restrict the issuance of export licenses for crude oil to circumstances in which no domestic refiner was willing to take delivery. *See* 39 Fed. Reg. 15114 (May 1, 1974).

Pursuant to their export licenses, petitioners delivered approximately one million barrels of crude oil to Petco in the Bahamas during the first five months of 1974. During roughly the same period, and in its normal course of business, Petco sold the bulk of its refined petroleum products as imports into

the United States. *See, e.g.*, J.A. 529, 619-20, 640, 645. Unlike a domestic refiner, however, Petco was not subject to allocation and price controls. *New England Petroleum Corp.*, 2 FEA (CCH) ¶ 83,136 (May 2, 1975), *aff'd*, 2 FEA (CCH) ¶ 80,648 (Aug. 7, 1975), *modified on other grounds, New England Petroleum Corp.* v. *FEA*, 455 F. Supp. 1280 (S.D.N.Y. 1978). Indeed, all imports of petroleum products into the United States were exempt from price controls. 10 C.F.R. § 212.53(b), 39 Fed. Reg. 1924, 1952 (Jan. 15, 1974). Petco's practice was to set its prices solely by reference to competition and not by reference to its costs. J.A. 805.

In June, 1975, a rash of newspaper articles appeared alleging that petitioners or Petco had used political influence in obtaining the export licenses from the Department of Commerce. J.A. 410. FEO's successor, the Federal Energy Administration ("FEA"), assisted Congress and the Department of Justice in an extensive investigation. *Id.* at 408-09. At the end of this investigation, in March, 1976, the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce issued a report finding the allegations to be groundless. *Id.* at 408. The subcommittee did criticize the Department of Commerce for issuing the export licenses at a time when crude oil had been in short supply, but neither the subcommittee nor FEA suggested that the prices charged in the export sales had been unlawful. *Id.* at 410, 413.

2. Even though Congress and the Department of Justice independently had rejected the allegations of political influence, J.A. 408-09, FEA continued to issue subpoenas to petitioners, requesting testimony and documents relating to the issuance of the export licenses. Finally, in February, 1977, petitioners brought suit against FEA in the United States District Court for the Southern District of Alabama, seeking declaratory and injunctive relief from these administrative subpoenas. The United States intervened, seeking enforcement of

the subpoenas. *Id.* at 420. The subpoenas were enforced in September, 1977. App. D, *infra*.

Much later, after having been granted many extensions of time, *id.* at 4-6, the United States amended its counterclaim in November, 1978, to allege for the first time that petitioners' sales to Petco in early 1974 had not been "export sales" within the meaning of the regulatory exemption from price controls. *Id.* at 533. Relying upon section 209 of the Economic Stabilization Act of 1970 ("ESA"), as amended, 12 U.S.C. § 1904 note, *id.* at 534, the United States sought "a judgment requiring [petitioners] to pay into an escrow account, for subsequent distribution to NEPCO customers, a sum of between $6,000,000 and $9,000,000, plus interest," *id.* at 541. The counterclaim alleged no significant facts that had not been known to the government at the time the export licenses had been issued to petitioners, with FEO's approval, in 1974.

In July, 1979, the United States advised the district court that it could not identify any customer that had been overcharged as a result of petitioners' sales to Petco. *Id.* at 694-96. The United States nonetheless moved for summary judgment on its counterclaim, on the theory that restitution could be paid to Nepco or "to the United States Treasury for the benefit of its citizens generally." App. B, *infra*, p. 42a. The district court granted the motion for summary judgment and awarded restitution payable to the United States Treasury.

Petitioners had argued that, in view of the absence of any applicable federal statute of limitation, the United States' counterclaim under section 209 of the ESA was subject to the most analogous state statute of limitation, Alabama Code § 6-2-39(5), and was barred by that statute. The district court rejected this argument, relying upon *Occidental Life Ins. Co.* v. *EEOC*,

432 U.S. 355 (1977). The court reasoned that because the purposes of federal price controls "are clearly national in scope," App. B., *infra*, p. 34a, and "restitution in ESA enforcement actions is 'appropriate and necessary to enforce compliance,' " *id.*, *quoting from University of Southern California v. Cost of Living Council*, 472 F.2d 1065, 1070 (TECA 1972), the state statute of limitation could not apply.

In considering whether petitioners' sales to Petco were exempt from price controls as "export sales" under 10 C.F.R. § 212.53(a), the district court apparently recognized, as the government itself had conceded, J.A. 581-82, that the sales had been exempt from allocation controls as "exports" under 10 C.F.R. § 211.1(b)(1). App. B, *infra*, p. 38a. The district court reasoned, however, that "[i]f all 'exports' are not 'export sales,' then any charges over the ceiling price would have been received in violation of the price regulations." *Id.* The court determined that the two parallel exemptions were substantially different in scope, because (1) the Cost of Living Council, in administering an earlier system of price controls, had not treated sales to federal instrumentalities abroad as exempt "export sales," *id.* at 39a, and (2) the exemption for "export sales" included not only exports but "certain domestic transactions where the product is destined for export . . . ," *id.* at 40a. On the basis of its finding that "[t]he economic effect of the transactions in this case was higher oil prices to American buyers," *id.* at 41a (a finding on summary judgment for which there was no factual basis in the record), the court held that petitioners' sales to Petco could not be treated as "export sales" and therefore "violated the price regulations . . . ," *id.*

The court further held that neither Petco nor Nepco was entitled to recover restitution. Because they had "supported [petitioners] in receiving the export licenses," *id.* at 44a, "[t]hey are barred from recovery by their 'unclean hands,' " *id.* Apparently believing that Petco's and Nepco's customers had

been overcharged, but having no basis in the record for identifying any overcharged customer, the court awarded restitution to the United States: "[r]ealistically this holding very simply means that, since the people are sovereign, and where large numbers, here millions, have been injured, the peoples' institution, the United States Government, will recover the disgorged wrongful profits." *Id.* at 46a. The court reserved for later determination "the amount of restitution to be made." *Id.* at 49a.

3. On interlocutory appeal, the Temporary Emergency Court of Appeals, with one judge dissenting in part, affirmed the judgment of the district court except as to the award of restitution to the United States.

a. The court of appeals held that actions brought by the United States under section 209 of the ESA are not subject to any statute of limitation: "there is no specific federal statute of limitations applicable to § 209 actions," App. A, *infra*, p. 6a, but "[e]ffective nationwide enforcement of the ESA must not be hampered by the various periods of limitations throughout the fifty states," *id.* at 7a. Reasoning that "[c]ertainly [*sic*] as to the length of the limitation period will only facilitate the implementation of this national policy," *id.*, the court refused to recognize any limitation at all. Judge Pointer, concurring on this issue, suggested that "in some circumstances a defense of laches might be appropriate . . . ." *Id.* at 12a.

b. On the merits, the two-judge majority, without analyzing or even discussing either the regulatory language, or the agency's contemporaneous construction and formal interpretation of the exemption for "export sales," or the relationship between that exemption and other provisions of the price controls, determined that petitioners should not be "allowed to take advantage of what appeared to be a loophole in the law . . . ." *Id.* at 3a. The majority reasoned that "these transactions had precisely the effect which Congress sought to avoid in

enacting the Emergency Petroleum Allocation Act of 1973 (EPAA), to wit; higher oil prices to American buyers." *Id.* at 4a. Because petitioners' sales to Petco "were designed so as to take advantage of the established regulations and were completely repugnant to Congress' intent," *id.* at 6a, they "were not 'export sales' within the meaning of the EPAA," *id.*

Judge Pointer dissented. He explained that the consistent understanding of the agency's lawyers and officials during and after the time of petitioners' sales had been that sales made pursuant to valid export licenses were exempt from price controls. *Id.* at 13a. He stated that "[i]t can hardly be doubted that the sales by the [petitioners] to PETCO — sales of crude oil produced by a domestic company in the United States to an unrelated foreign company located in the Bahamas, for refining at Bahamian facilities — would in ordinary usage be considered an 'export sale,' " *id.* at 14a, and that "[o]ne can hardly reconcile the present ruling, treating the transactions for purposes of price controls as if PETCO were a domestic refiner, with the earlier decision of the agency that for purposes of the allocation regulations 'it is . . . not appropriate that [PETCO's refinery] which is located in a foreign country be treated as if it were located in the United States,' " *id.* at 15a (deletions and brackets in original), *quoting from New England Petroleum Corp.*, 2 FEA at 83,429. And he pointed out that, since Petco's own sales of petroleum products were not subject to any price controls, to impose controls on petitioners' sales of crude oil to Petco would have "the bizarre result that . . . the so-called improper profits could have been made by a foreign company such as PETCO but not by domestic companies such as the [petitioners]." *Id.* at 16a.

c. All three judges on the panel agreed that "payment to the United States Treasury is not restitution, in the true sense of the word, or in the objectives of the statutes here involved." *Id.* at 8a, 17a. The two-judge majority, however, approved the

district court's determination that Petco and Nepco were ineligible for restitution and held that petitioners could be ordered to make payments to the United States to be held in escrow pending subsequent distribution to "those overcharged . . . ." *Id.* at 10a.

Judge Pointer dissented on this issue as well:

> The approach of the majority, while lacking the simplicity and directness of that adopted in the district court, suffers in my opinion from the same fatal flaw — prescribing a judicial remedy for violation of the regulations which is beyond that authorized in the Congressional enactment or the administrative regulations. In place of the remedy constructed by the district court, which in essence intermingles the provisions of the Act relating to civil penalties with those relating to restitution, the panel has substituted a remedy which in essence melds the concept of a parens patriae action with that of a fluid recovery. In my opinion neither approach is warranted by applicable law and precedents and each would have farreaching, untoward jurisprudential consequences.

Id. at 17a-18a (footnotes omitted).

REASONS FOR ALLOWING THE WRIT

In holding that the United States may bring suit in a representative capacity under section 209 of the ESA without regard to any period of limitation, the court of appeals finds itself in conflict with a long line of decisions of this Court, beginning with such early cases as *McCluny* v. *Silliman*, 28 U.S. (3 Pet.) 270 (1830), *Bacon* v. *Howard*, 61 U.S. (20 How.) 22 (1858), and *United States* v. *Beebe*, 127 U.S. 338 (1888), and extending down to the present. The question is important. To permit actions to be brought without limitation of time "would be utterly repugnant to the genius of our laws." *Adams* v. *Woods*, 6 U.S. (2 Cranch) 336, 342 (1805). If the decision below is left standing, the United States can be expected to burden the petroleum industry and the courts until well into the

1990's, with lawsuits arising out of events occurring as long ago as the early 1970's. Indeed, the Department of Energy already has identified more than 700 such cases for future litigation.[8]

In refusing to treat sales made pursuant to validly issued export licenses as exempt "export sales," *i.e.*, in refusing to permit petitioners ' to take advantage of the established regulations," App. A, *infra*, p. 6a, the court of appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Rule 17.1(a) of the Rules of this Court.

1. Congress chose not to prescribe a federal period of limitation for the rights of action established in the ESA. Instead, it relied upon the rule, now more than 150 years old, that "the acts of limitations of the several states, where no special provision has been made by Congress, form a rule of decision in the courts of the United States." *McCluny* v. *Silliman*, 28 U.S. (3 Pet.) at 277. When Congress creates a cause of action but does not prescribe a period of limitation, "this Court has repeatedly 'borrowed' the state law of limitations governing an analogous cause of action." *Board of Regents* v. *Tomanio*, 446 U.S. 478, 483-84 (1980). *See also, e.g., Runyon* v. *McCrary*, 427 U.S. 160, 180 (1976); *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 462 (1975). As a consequence, when a private plaintiff brings an action for damages under section 210 of the ESA the local statute of limitation applies.

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[8] *See* R. Hanzlik, Administrator for Economic Regulation, Department of Energy, statement before the Subcommittee on Environment, Energy and Natural Resources of the House Committee on Government Operations (April 19, 1982). In his statement, Administrator Hanzlik advised the Subcommittee that the agency had prepared or was in the process of preparing for litigation a total of 51 actions against major refiners, 417 actions against small refiners, processors, producers, and product resellers, and 241 actions against crude oil resellers.

Ashland Oil Co. of California v. *Union Oil Co. of California*, 567 F.2d 984 (TECA 1977), *cert. denied*, 435 U.S. 994 (1978); *Colorado Petroleum Products Co.* v. *Husky Oil Co.*, 646 F.2d 555 (TECA 1981).

When the United States brings suit in a representative capacity, as "a conduit through which one private person can conduct litigation against another private person," *United States* v. *Beebe*, 127 U.S. at 347, it is subject to the same period of limitation that governs the assertion of private rights. *See also, e.g., United States* v. *New Orleans Pacific Ry. Co.*, 248 U.S. 507, 519 (1919); *Moran* v. *Horsky*, 178 U.S. 205, 213 (1900); *United States* v. *American Bell Telephone Co.*, 167 U.S. 224, 264-65 (1897). And when a representative sues in equity on behalf of a third party whose remedy was at law, "he is, of course, subject to the same rules of prescription as if he were in a court of law." *Bacon* v. *Howard*, 61 U.S. (20 How.) at 26. Statutes of limitation, moreover, apply of their own force to suits in equity where there is a parallel legal remedy. *See, e.g., Cope* v. *Anderson*, 331 U.S. 461, 463-64 (1947); *Russell* v. *Todd*, 309 U.S. 280, 289 (1940); *Wilson* v. *Koontz*, 11 U.S. (7 Cranch) 202, 205-06 (1812).[9]

From these converging lines of authority, it follows that suits brought by the United States for restitution under section 209 of the ESA, like private actions for damages brought under section 210, are subject to the local period of limitation. The United States is proceeding in a representative capacity when it sues for

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[9] The court of appeals mistakenly analogized this case to *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946), rather than to such cases as *Bacon* and *Cope*. The plaintiff in *Holmberg* was suing on his own behalf to enforce "a federal right for which the sole remedy is in equity." 327 U.S. at 395. In contrast, if the third persons represented by the United States in this case had sued in their own behalf, their remedy would have been at law, not in equity, and their suit, if as tardy as that brought for them by the United States, would have been barred by the state statute of limitation.

restitution under section 209. In such suits, restitution is payable only to injured third persons; the United States, as a nonpurchaser, is not entitled to receive payment of restitution in its own right. App. A, *infra*, pp. 8a, 17a. In suing for restitution under section 209, therefore, the United States is acting solely as a conduit for private persons who, in the exercise of diligence, could have pursued their own independent statutory remedies. Thus, suits under section 209 should be governed by the same period of limitation applicable to actions under section 210.

The contrary holding below, that the United States is subject to no limitation period whatsoever when it proceeds under section 209, conflicts with *McCluny*, *Beebe*, *Bacon*, and their many progeny. In reaching its result, the court of appeals relied upon *Occidental Life*. But that case, which is a rare and narrowly delimited exception from the *McCluny* and *Beebe* lines of authority, cannot be extended so far from its roots in the unique features and specific legislative history of the particular regulatory program from which it arose. In *Occidental Life*, application of the state statute of limitation would have "directly conflict[ed] with the timetable for administrative action expressly established [by Congress]." 432 U.S. at 369. Because "the EEOC is required by law to refrain from commencing a civil action until it has discharged its administrative duties," *id.* at 368, in some instances the agency's right to bring suit would not have matured until the state statute had run, *id.* at 369 n. 23. The legislative history, moreover, was incompatible with an intention to subject enforcement actions to state limitation periods. *Id.* at 369-70.

None of the considerations that led this Court to make an exception in *Occidental Life* appear here. There is no impediment to the prompt initiation of suit under section 209; to the contrary, the statute authorizes suit to be brought immediately, "[*w*]*henever* it appears . . . that any individual or organization has engaged, is engaged, or is about to engage in any . . .

violation . . ." (emphasis added). Nor is there any basis in the legislative history for believing that Congress thought state limitation periods were incompatible with an enforcement tool thus designed for instant implementation. [10] As another panel of the court of appeals below recognized in the context of private actions, the statute involved here

> contains no indication that expressed national policy is inconsistent with any fixed period of limitation borrowed from state law. . . . There is no suggestion whatever in the statutory structure undergirding the claims before us that Congress intended no limitations provision to apply or that state statutes of limitations should not be looked to in accordance with the general rule . . . .

Ashland Oil Co. of California, 567 F.2d at 989.

Here, as in *Ashland*, the period of limitation prescribed by state law is one year. But the United States can have no more excuse here than did the plaintiff in *Ashland* for not proceeding within the time allowed. There was no impediment to instantaneous action. All relevant facts were known to the government at the time petitioners filed their applications for export licenses in early 1974. If, as the United States asserts in this litigation, petitioners' sales to Petco were unlawful, the Department of Commerce, by denying the applications, could have prevented the sales from ever taking place. Or the United States could have sought to enjoin the sales after the licenses had issued. Or a suit for restitution could have been brought immediately after the sales were completed, well within the time allowed by state

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[10] The Court in *Occidental Life* also had drawn support from the fact that "[t]he absence of inflexible time limitations on the bringing of lawsuits will not . . . deprive defendants in Title VII civil actions of fundamental fairness or subject them to the surprise and prejudice that can result from the prosecution of stale claims . . . [because] the Title VII defendant is alerted to the possibility of an enforcement suit within 10 days after a charge has been filed." 432 U.S. at 372. There is no similar protection against surprise under the ESA.

law. In short, the United States could have acted promptly, as the Department of Commerce in fact had done when it amended its regulations within one month after the issuance of petitioners' last export license. *See* page 4, *supra*. Instead, the United States waited nearly five years before bringing suit. No statutory purpose or congressional policy would have been defeated by requiring the government to act either promptly or not at all.

The United States should not be allowed to circumvent state limitation periods by bringing untimely suits on behalf of third persons who slept on their rights. This is a matter of grave concern both to the petroleum industry and to the courts. The petroleum industry was subject to a unique program of regulatory price controls during the period from 1973 to 1981. Hundreds of lawsuits and enforcement actions have arisen from that program, and the Department of Energy claims that hundreds more may still be initiated. *See* note 8, *supra*. At some point the industry should be free of this overhanging cloud of threatened litigation. Congress could not have intended "interminable exposure to liability . . . ." Note, *An Interest-Analysis Approach to the Selection of Statutes of Limitation*, 49 N.Y.U.L. Rev. 299, 302 (1974). Nor could Congress have intended to burden the courts with the problems of the 1970's until well into the 1990's. This Court should take this case in order to forestall the burdensome and inequitable consequences of the decision below

2. The Temporary Emergency Court of Appeals ("TECA"), as a specialized tribunal with nationwide jurisdiction, has a special duty to develop and exhibit expertise in the petroleum price and allocation controls and to decide issues arising from those controls in a careful and dispassionate manner. In this case, TECA abdicated that duty.

By all conventional standards of statutory or regulatory construction, petitioners' sales of crude oil to Petco, pursuant to validly issued export licenses, were "export sales." First, there

is the plain meaning of the text. *See, e.g., American Textile Manufacturers Institute, Inc.* v. *Donovan*, 452 U.S. 490, 508-09 (1981). "Export sales" embraces all sales directly or indirectly "for export," 10 C.F.R. § 212.53(a), and that plainly includes all sales made abroad pursuant to export licenses. Second, there is the contemporaneous construction by the agency's own lawyers and officials. *See, e.g., Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933). During 1974 and 1975, FEO's and FEA's lawyers and officials consistently determined that transactions such as petitioners' sales to Petco, made pursuant to export licenses, qualified as "export sales." *See* J.A. 314-15, 402, 412-13. Third, there are the agency's own formal rulings and interpretations. *See, e.g., United States* v. *Larionoff*, 431 U.S. 864, 872 (1977). In its formal interpretations, FEA expressly held that sales "made into geographic areas outside of the United States," pursuant to "export licenses," are "[e]xport sales for purposes of the regulations . . . ." *Guam Oil & Refining Co.*, Interpretation No. 76-22, *Enforcement Manual* (CCH) ¶ 56,308 at 56,373 (Nov. 21, 1976). *See also Chevron U.S.A., Inc.*, Interpretation No. 80-10, *Enforcement Manual* (CCH) ¶ 56,490 (June 2, 1980) (sales of bunker fuel to American carriers in the Panama Canal Zone were "export sales").[11] Fourth, there is the relationship between various provisions of the regulations and the need to harmonize the overall regulatory scheme. *See, e.g., Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-32 (1973). Although the United States argues that petition-

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[11] In arguing that petitioners' sales to Petco were not "export sales," the United States thus far has relied solely upon rulings dealing with sales to federal instrumentalities abroad and with equal-volume exchanges. But the agency's own rulings distinguished sales to federal instrumentalities on the ground that they "are not normal commercial export transactions." Ruling 1973-3, 38 Fed. Reg. 17523 (July 2, 1973). Equal-volume exchanges are not even "sales" under the regulations. *See* 10 C.F.R. § 212.82 (definition of "exchange"). *See also* 43 Fed. Reg. 59810 (Dec. 21, 1978).

ers' sales to Petco were not exempt from price controls as "export sales," it correctly concedes that those sales were exempt from allocation controls as "exports." J.A. 581-82. "[A]n inconsistent interpretation such as [the United States] suggest[s] should hardly be favored." App. A, *infra*, p. 15a. Moreover, Petco's foreign refinery was outside the territorial jurisdiction of the regulations, *see New England Petroleum Corp.*, 2 FEA at 83,429, so that its own sales of refined petroluem products were exempt from price controls. The imposition of domestic price controls upon exports of crude oil to an exempt foreign refiner would confer a windfall upon the foreign refiner at the expense of domestic producers and consumers, truly a "bizarre result . . . ." App. A, *infra*, p. 16a.

The two-judge majority, however, ignored all these considerations. The interpretative sources upon which the majority instead chose to rely had nothing to do with the price control program. First, the majority analogized petitioners' sales to Petco to the temporary storage of a commodity abroad. *See* App. A, *infra*, pp. 3a-4a. That analogy was very wide of the mark: petitioners' interest in the crude oil was terminated by its arm's length sale to Petco (a wholly unrelated corporation), and "crude oil is simply quite different from the ultimate products which come out of a refinery." *American Maritime Ass'n* v. *Blumenthal*, 590 F.2d 1156, 1162 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 943 (1979). Second, the majority analogized petitioners' exports to Petco to a federally financed sale of goods to a foreign government, as in *United States* v. *Consolidated Phosphate Export Ass'n*, 393 U.S. 199 (1968). *See* App. A, *infra*, p. 5a. What the majority overlooked, however, is that FEA itself squarely held that federally financed sales of crude oil to a foreign government were exempt "export sales." *See Guam Oil & Refining*, *supra*, and *United States Department of the Interior for the Government of the Northern Mariana Islands*, 6 FEA (CCH) ¶ 83,026 (June 28, 1977).

It is apparent that even the majority understood that petitioners' exports to Petco qualified under the regulations as "export sales." The majority nevertheless determined to deprive petitioners of the "advantage of the established regulations . . . ." App. A, *infra*, p. 6a. It did so out of a dislike for the regulatory exemption for "export sales" as "a loophole in the law," *id.* at 3a, and out of a belief that the exemption had operated in this case in a manner "completely repugnant to Congress' intent," *id.* at 6a. The majority did not explain the basis for this belief. Presumably, it had in mind "the brilliant rationale of the trial court in its envision [*sic*] of millions of customers along the east coast having been overcharged." *Id.* at 8a. In fact, no such customer was overcharged. As an exempt foreign refiner, Petco determined its prices for the petroleum products it sold into the United States by reference to its competitors' posted prices. J.A. 805. The price Petco had paid petitioners for crude oil therefore had no bearing whatsoever on the prices Petco charged its own customers for petroleum products. No downstream domestic consumer was injured by petitioners' sales to Petco.

The majority's reasoning in this case was thoroughly unsound. Yet, if the decision below is permitted to stand, petitioners will be subject to liability in an amount that the United States has estimated at not less than six million dollars. *See* page 6, *supra*. This Court should act to prevent this injustice.

Although injustice in an individual case may be a matter of parochial concern, this case in fact is symptomatic of a broader problem. TECA, unlike the courts of appeals of general jurisdiction (and even unlike other specialized federal appellate courts), heretofore has not been subject to the effective check that would be provided by the realistic prospect that this Court may exercise its power of review. This Court has granted plenary review of only one decision by TECA, *Fry* v. *United States*, 421 U.S. 542 (1975), and that case did not affect private

rights. This Court should review the decision below in order to provide the institutional discipline necessary to ensure responsible decision-making.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April, 1982.

Appendix

APPENDIX A

Temporary Emergency Court of Appeals of the United States

No. 5-60
No. 5-61

CITRONELLE-MOBILE GATHERING, INC., ET AL.,
Plaintiffs-Appellants,

v.

JAMES B. EDWARDS, SECRETARY OF ENERGY, ET AL.,
Defendants-Appellees.

Appeal From The United States District Court
For The Southern District of Alabama

(Civ. 77-101-P)

(Argued: October 9, 1981 Decided: January 21, 1982)

Before SPEARS, HEMPHILL and POINTER, Judges.

HEMPHILL, Judge.

This litigation involves four cargo shipments of crude oil which were sold and shipped from appellants, Citronelle-Mobile Gathering, Inc. ("Gathering"), and Citmoco Services, Inc. ("Citmoco"), to the Grand Bahamas Petroleum Company ("PETCO") in the commonwealth of the Bahamas, pursuant to four export licenses issued by the Department of Commerce. These shipments were made pursuant to agreements between Bart Chamberlain, principal officer and principal stockholder of Gathering and Citmoco, and Edward M. Carey, principal officer and/or director of Carey Energy Corporation which owned New England Petroleum Corporation ("NEPCO"). It affirmatively appears that PETCO, to which company the petroleum was originally shipped from the United States, is a wholly owned

subsidiary of NEPCO, the final recipient of the oil in question. The oil was refined by Bahamas Oil Refiners Co. ("BARCO") which is partially owned by PETCO. The first three contracts involved a sale of approximately 765,000 barrels at $14.00 per barrel; a fourth sale was of approximately 200,000 barrels at $13.00 per barrel. In order to effectuate the sale of PETCO, appellants were required to obtain export licenses from the Department of Commerce, and did so upon the showing that the proposed exportation of crude oil would not "affect the total quantity or quality of petroleum available to domestic users. . . ." 15 C.F.R. § 377.6(b)(1); 38 Fed. Reg. 34442, 34443 (Dec. 13, 1973). The Federal Energy Office participated in the review and approval of the application for the export licenses, and officials of the Federal Energy Office were fully informed as to the details of the transactions.

Spawned by newspaper articles appearing in the summer of 1975, an initial investigation was had into the possible involvement of the Governor of New York resulting in a grand jury determination, with ultimate acknowledgement by the Department of Justice, that there was no credible evidence to support any allegations against that individual. A congressional investigation also concluded that there was no substance to the allegations against the Governor of New York. In January, 1976, the Federal Energy Agency ("FEA") instituted another investigation involving, primarily, the enforcement of certain subpoenas, and during that litigation, in November of 1978, defendant filed a second allowed counterclaim under the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 n. § 209[1] ("ESA") on behalf of the alleged overcharge of the domestic customers of NEPCO.

On cross motions for summary judgment, the district court granted partial judgment for the United States. *Citronelle-Mobile Gathering, Inc.* v. *O'Leary*, 499 F.Supp. 871 (S.D. Ala. 1980). From this judgment appellants pursue an interlocutory appeal presenting four issues for decision at this level.

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[1] In addition to . . . injunctive relief the court may also order restitution of moneys received in violation of any . . . order or regulation.

The case and all incidental issues revolve around the central question of whether the export exemption applies. If the sales are to be treated as exports, and/or domestic sales for export crude petroleum subject to the export licenses regulations of the Department of Commerce ("DOC"), then such are expressly excluded from FEA's petroleum allocation regulations; 10 C.F.R. § 211.1 Prices charged for export sales, including sales to a domestic purchaser which certifies the product is for export, are also exempt from FEA's petroleum pricing regulations; 10 C.F.R. § 212.53. The question of whether the export exemption applies suggests the conclusion that if appellants are allowed to take advantage of what appeared to be a loophole in the law, then the whole concept of consumer protection, as found in the Department of Energy's ("DOE") regulations, may be frustrated. We consider in this light.

THE SALES OF AMERICAN CRUDE OIL BY AN AMERICAN FIRM TO THE WHOLLY OWNED SUBSIDIARY OF ANOTHER AMERICAN FIRM WERE NOT "EXPORT SALES"

Appellants have urged this Court to consider the "plain" or "commonly accepted" meaning of the term "export sale." This Court cannot concentrate on individual words and ignore a consideration of the context in which the term appears. In order to determine the precise meaning of the term "export sale" it is imperative that strong consideration be given to the entire transaction giving rise to the "export sale," [2] coupled with a consideration of the purpose for which this regulation was intended. [3]

As stated earlier, appellant firms, both American corporations, sold crude oil produced in the United States to PETCO, a wholly-owned foreign subsidiary of another American corporation (NEPCO). Once refined, the same quantity of refined products was returned, not only to the United States, but to the *refiner's parent corporation* in the United States. This transaction, admittedly clever, is not original. In 1883, the Attorney General issued an opinion evolving from circumstances in which whiskey was to be shipped

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[2] *E.g., Tenneco Oil Co.* v. *FEA*, 613 F.2d 298, 303 (TECA 1979).

[3] *E.g., United States* v. *Weber*, 443 U.S. 193, 201 (1979).

from the United States to Bermuda with the intent that it be returned to the United States after it had been aged. That opinion, holding there was no exportation, was later quoted with approval by the Supreme Court. *See Swan & Finch* v. *United States*, 190 U.S. 143, 145 *quoting* 17 Op.A.G. 579, 583 (1883). The Court stated:

> [T]he legal notion . . . of exportation is a severance of goods from the mass of things belonging to this country with the intention of uniting them to the mass of things belonging to some foreign country.

Id. at 145. *See also United States* v. *200 Watches*, 66 F.Supp. 228, 230, (S.D. N.Y. 1946). In the case at bar, appellant's intention was that the refined products attributable to the Chamberlain firm's crude oil be returned to the United States. There was never any intention that the crude oil be joined with the mass of things in the Bahamas.

The apparent plan of appellant's transactions becomes much clearer when considered along with the purpose and actual requirements of the pertinent regulations. Exports, and domestic sales for export, of crude petroleum subject to export license regulations of the Department of Commerce were, and are, excluded from FEA's petroleum allocation regulations. Prices charged for these "export sales," are exempt from the FEA's petroleum pricing regulations. (10 C.F.R. § 212.53 provides: The prices charged for export sales including sales to a domestic purchaser which certifies the product is for export, are exempt.) In order to take advantage of this exemption one must follow the simple, rudimentary procedure of obtaining an export license. This involves a showing that the "total quantity or quality of petroleum available to the United States" would not be diminished. 15 C.F.R. § 377.6(b)(1). Once licensed, an exporter is free to charge whatever price the foreign market can bear. Thus, the regulations were promulgated in such a way as to, among other things, increase foreign revenue, stabilize the economy, and assure sufficient quantities of petroleum. However, when the economic reality of the transactions is examined, it is quite obvious, as the able trial judge perceived, that these transactions had precisely the effect which Congress sought to avoid in enacting the Emergency Petroleum Allocation Act of 1973 (EPAA), to wit; higher oil prices to American buyers. *Citronelle, supra* at 883.

Finally, the case of *United States* v. *Concentrated Phosphate Export Assn.*, 393 U.S. 199 (1968), is instructive and somewhat analogous. *Concentrated Phosphate* involved foreign aid paid for by the United States, specifically sales of phosphate to the Republic of Korea financed by the Agency for International Development. The Court faced the question of whether the associations made the sales "in the course of export trade" within the meaning of the Webb-Pomerene exemption, 15 U.S.C. §§ 61 *et seq.*, to the Sherman Act. The exemption allows the formation of joint associations in order to compete with foreign cartels in export trade. In making its decision the Supreme Court examined the purpose of the act in light of transactions occurring in attempts to take advantage of the Act. It is important to note that there is great similarity in the purpose of the DOE's "export sales" exemption and that of the Webb-Pomerene Act. In the DOE exemption, price controls were implemented to, "benefit United States consumers and the domestic economy." FEA Ruling 1975-7, 40 Fed. Reg. 30037 (July 17, 1975). Likewise, in dealing with the Webb-Pomerene Act, the Court, in *Concentrated Phosphate*, noted:

> It is clear what Congress was doing; it thought it could increase American exports by depriving foreigners of the benefits of competition among American firms, without in any significant way injuring American consumers. Cf. *United States Alkali Export Assn.* v. *United States*, 325 U.S. 196, 211 (1945). The validity of this economic judgment is not for us to question, but it is quite relevant in interpreting the language Congress chose. The question before us is whether Congress meant its exemption to insulate transactions initiated, controlled, and financed by the American Government, just because a foreign government is the nominal "purchaser." We think it did not.

Id at 208. As a result of this analysis the Court held:

> [T]he framers of the Webb-Pomerene Act did not intend that Americans should be deprived of the main benefits of competition among American firms. Since in all relevant aspects the transactions involved here were American, not Korean, we hold that they are not "export trade" within the meaning of the Webb-Pomerene Act.

Id at 209-10.

We conclude and so hold, that the trial judge was correct in his conclusion that these transactions were not "export sales" within the meaning of the EPAA. Appellant's transactions involved a mere hint of foreign participation, were designed so as to take advantage of the established regulations and were completely repugnant to Congress' intent.

APPLICATION OF ALABAMA'S ONE-YEAR STATUTE OF LIMITATIONS WOULD FRUSTRATE EFFECTIVE ENFORCEMENT OF THE ESA, EPAA AND RELATED STATUTES

This Court is faced with the question of whether Alabama's one-year statute of limitations[4] should be applied. If this statute were applied, the Government's claim for restitution would be altogether barred.

We find there is no specific federal statute of limitations application to § 209 actions; there are various guidelines available which enable this Court to determine whether the Alabama statute applies. Specifically, the Supreme Court

> has not mechanically applied a state statute of limitations imply because a limitations period is absent from the federal statute. State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state laws will not frustrate or interfere with the implementation of national policies. "Although state law is our primary guide in this area, it is not, to be sure, our exclusive guide." *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 456 (1974). State limitations periods will not be borrowed if their application would be inconsistent with the underlying policies of the federal statute.

Occidental Life Ins. Co. v. *EEOC*, 432 U.S. 355, 367 (1977). It is also clear that state statutes of limitations must not be applied if such application would "frustrate or interfere with the implementation of national policies." *Id.* at 370-71.

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[4] That statute provides a one-year limitation on "[a]ctions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section . . . ."

The primary underlying policy of the ESA is to insure effective enforcement of the pricing regulations, on a national scale. *See Bulzan* v. *Atlantic Richfield Co.*, 620 F.2d 278 (TECA 1980). As an aide to such enforcement the DOE has the right to seek restitution in ESA enforcement actions. In fact, restitution is "appropriate and necessary to enforce compliance." *Univ. of Southern California* v. *Cost of Living Council*, 472 F.2d 1065, 1070 (TECA 1972). The right to enforce compliance to such restitution of price overcharges is equitable, *Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946), and suits to enforce equitable rights created by federal law are not subject to state statutes of limitations, even if brought by a private party. *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946).

Additionally, we must consider the overall effect of borrowing state statutes of limitations in cases such as the one at bar. Effective nationwide enforcement of the ESA must not be hampered by the various periods of limitations throughout the fifty states. Certainly as to the length of the limitation period will only facilitate the implementation of this national policy. Thus, we affirm the trial judge's decision to refuse the application of Alabama's one-year statute of limitations.

RESTITUTION IS APPROPRIATE RELIEF

Having agreed with the district court's determination that appellants have violated the provisions of the ESA, EPAA and the regulations promulgated thereunder which establish the ceiling price for the four sales of domestic crude oil, and the maximum lawful selling price for the resale of domestic crude oil, 6 C.F.R. part 150 and 10 C.F.R. part 212, this Court reviews the relief fashioned by the district court judge. The counterclaim seeks judgment requiring plaintiffs to pay into an escrow account, "for subsequent distribution to NEPCO customers," the excess charges. Allegations place the sum between $6,000,000.00 and $9,000,000.00, exclusive of interest and civil penalties. No accurate calculations are before the Court at this time. This Court concurs in the district court's conclusion [499 F.Supp. at 885] that good faith, as opposed to willfulness, characterized plaintiff's dealings with the Department of Commerce.

An immediate confrontation with the method/process of enforcement emerges. Neither appellants, nor various *amici* attack restitution as being outside the scope of relief authorized, rather, they insist the decision ordering restitution to the United States Treasury is beyond the district court's authority. The Court finds on this issue no justification for allowing plaintiffs to retain their illegal gains.

The district court, sitting as a Court of Equity, unless otherwise provided by statutes here in contemplation, had "all the inherent equitable powers of the District Court . . . available for the proper and complete exercise of that jurisdiction"; *Porter, supra* at 398, and has power, "to do equity and mould each decree to the necessities of the particular case"; further, "It may act so as to adjust and reconcile competing claims . . . so as to accord full justice to all the real parties in interest . . . ." The authority inherent in the equity powers guarantees complete rather than truncated justice. *Camp* v. *Boyd*, 229 U.S. 530, 551 (1913). The power of a district court to require restitution, as was pronounced in *United States* v. *Lieb*, 333 F.Supp. 424 (W.D. Tex. 1971), was specifically endorsed and ratified by Public Law 92-507[5] (Sec. 209), but nothing has been pronounced as to payment to the United States Treasury. Federal district courts unquestionably possess broad discretion in fashioning equitable remedies, *Franks* v. *Barron Transportation, Co.*, 424 U.S. 747, 764 (1975) but, as contemplated in the exercise of these powers to remedy civil wrongs and restore civil rights, the authority is vested to make the victims whole, "so far as possible, and restored to a position where they would have been had it not been for" the unlawful violation, such as was practiced here. It follows that payment to the United States Treasury is not restitution, in the true sense of the word, or in the objectives of the statutes here involved.

We face the brilliant rationale of the trial court in its envision of millions of customers along the east coast having been overcharged. Clear, however, is the fact that the sale of the over-priced oil was made to determinable utilities and other institutions along the Atlantic seaboard. Faced with a statute that specifically authorizes restitution,

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[5] *See* U.S. Code and Congressional News, 92d Congress, 1st Session (1971) pp. 2283, 2291.

but makes no provision for direct payment to the treasury, we turn to *University of Southern California, supra,* which ordered refunds of excess charges for football tickets.

> While this Court recognizes the considerable burden that such a refund demand places . . . we recognize also the right of the agencies to require it.

Id. at 1070.

We believe such a process to be a reasonable application of the power of the district court. This is obviously in the contemplation of defendant as evidenced by its request for relief. Actions by the United States under ESA § 209 are taken to enforce public, not private, rights. Thus, compensation is "a by-product of the agency's effort to re-establish compliance with its regulatory scheme." *Bulzan, supra* at 282. The central purpose of restitution is to determine the amount by which the wrongdoer has been unjustly enriched, and then to make him disgorge that amount. No proof is required that the plaintiff was damaged, much less the amount of any damage:

> Restitution is generally awarded only in order to deprive the defendant of enrichment obtained at the plaintiff's expense . . . the general requirement does not mean that the gain to the defendant need be equated to the loss of the plaintiff, nor indeed that there need be any loss to the plaintiff except in the sense that a legally protected interest has been invaded.

Restatement of Restitution, Sec. 1, Comment e (1937), cited in *Sauder* v. *Doe,* 648 F.2d 1341 (TECA 1981). The district court properly held that because NEPCO and PETCO aided and abetted the Chamberlain firms in their violation of the price regulations, for their material benefit they are barred by "unclean hands" from seeking or recovering any of the illegal profits.

Apparently, however, restitution payments may be made to the Treasury under special order of the court. The Treasury holds the payments in a "Deposit Fund Account" to be paid out at the direction of DOE. *See* General Accounting Office Procedures Manual, Title 7, Sec. 4.10(6). *Cf. Hodgson* v. *Wheaton Glass Co.*, 446 F.2d 527, 535 (3d Cir. 1971).[6] Receipts contained in those accounts are subject to a

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[6] *See also* 28 U.S.C. §§ 2041, 2042.

"constructive trust," *Emery* v. *United States*, 186 F.2d 900, 902 (9th Cir. 1951); are treated as liabilities of the United States, *see e.g.*, Treasury Combined Statement of Receipts, Expenditures, and Balances of the United States Government, Fiscal Year 1978 at 3,12; and for their disbursement, an appropriation is not required. This affords an opportunity for DOE to pursue those proposals suggested by its request that the Court

> Enter a judgment requiring Gathering, Services and Chamberlain to pay into an escrow account for subsequent distribution to NEPCO customers, a sum of . . .

As determined by the district court the Government has demonstrated injury to a class of persons. Whether the defendant will ask to amend under Rule 15, Federal Rules of Civil Procedure, institute interpleader under Rule 22 and related statutes, or proceed otherwise is not revealed in the record before this Court. Suffice it to note that the Government has a *duty* to try to ascertain those overcharged, and refund them, with interest, from the restitution funds.

The Order of the district court is modified and the case remanded to that forum for an Order directing the application to the General Accounting Office Procedures, and/or the furnishing of a plan for the "Deposit Fund Account," and/or other appropriate procedures, to be approved by the district court.

Meanwhile, within such time as the district court may direct, the parties will enter a stipulation, failing which, file appropriate motions in that forum.

THERE IS NO FACTUAL BASIS FOR RECUSAL BY THE DISTRICT JUDGE

The grounds for recusal in this case were based entirely upon the unsupported assertion, of a United States' Attorney's unverified opinion, made at a social gathering. Regardless of whether it was a statement of the Attorney's opinion,[7] the motion failed to meet the

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[7] The attorney later recanted and stated he had no reason to believe the judge acted improperly or was biased, acknowledging the statements were "totally baseless and unfair."

requirements of 28 U.S.C. § 455 and of 28 U.S.C. § 144. The motion was entirely without integrity, in addition to being untimely.

The issue was not urged by appellants. We find no justification for lengthy discussion. The findings of the district court are adopted as the findings of this Court.

The judgment of the district court is affirmed except as modified by the opinion of this Court, and this case is remanded to the district court for further proceedings in keeping with this opinion.

AFFIRMED AS MODIFIED.

POINTER, concurring in part, dissenting in part:

A. *Disqualification.*

I agree that there was no error in denying appellants' motion for disqualification under 28 U.S.C. § 455(a). I do not, however, find fault in the timing of the motion. Rather, I believe the motion — premised upon gratuitous speculation by opposing counsel as to possible bias of the judge, comments which the attorney later acknowledged to have been "totally baseless and unfair" — lacks a sufficiently colorable factual basis for any reasonable question to have been raised concerning the judge's impartiality.

B. *Limitations Period.*

I also concur in the conclusion that the government's claim for restitution was not barred by Alabama's one-year statute of limitation. As was true with the back pay claims presented by the government in *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355 (1977), such a limitations period would frustrate the implementation of national policies involved in the pricing regulations here in issue. The Supreme Court recognized in *Occidental* that in some circumstances a defense of laches might be appropriate; but the appellants have not here even argued that the trial judge was in error in finding that the defense of laches had not been established.

C. *Applicability of Price Controls.*

I must respectfully dissent, however, from the affirmance of the ruling that the sales to PETCO in 1974 were not "export sales" exempt from domestic price controls. While the imposition of price controls on these transactions might now appear to have been appropriate as a matter of policy, the regulations in place at the time the sales were contemplated and consummated did not limit the prices that PETCO might be charged, a conclusion which government officials had consistently, if begrudgingly, acknowledged prior to filing of the amended counterclaim in the present litigation in 1978.

The essential facts of the proposed transactions, including the price to be charged PETCO and the importation of a like quality of refined

products into the United States, were shown in the applications for export licenses reviewed by the Petroleum Products Exception Committee, which included representatives from the FEO. As the prices exceeded permissible domestic levels, the Department of Commerce contacted FEO's General Counsel, who offered no objection to the proposed transactions and advised that there appeared to be no legal basis for denying the applications. The export licenses were granted, and there has been no suggestion in this litigation that those licenses were other than valid and proper.

The transactions were later scrutinized by attorneys from a United States Attorney's office, from the Department of Justice, and from the FEA. In terminating that investigation, it was the opinion of each attorney that "if petroleum was exported pursuant to a valid export license, . . . the FEA price regulations did not apply to that sale."

Similarly, in an attachment to a letter to a Congressional committee investigating the transactions, the Administrator of the FEA wrote:

> Crude oil can be exported only pursuant to a valid export license. The FEA regulations have always provided that crude oil (or any refined product) sold for export is exempt from both FEA allocation and pricing regulations. 10 C.F.R. §§ 211.1(b)(1), 212.53(a). Therefore, assuming there is no other factor bearing on the issue, the sale of crude oil by a U.S. producer to a foreign refiner for export pursuant to a validly issued export license is exempt from U.S. price controls and can occur at whatever price the parties agree upon.

The interpretation of a regulatory system by those charged with its enforcement should be given great deference by the judiciary, *e.g.*, *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965), particularly with respect to a contemporaneous construction by those charged with setting the machinery of a new program in motion. *Chemehuevi Tribe of Indians* v. *Federal Power Comm'n*, 420 U.S. 395, 409-10 (1975). See also *Andrus* v. *Shell Oil Co.*, 446 U.S. 657, 667-68 (1980). This principle is not vitiated by the fact that the government agency may have at some later time in new interpretations or in the course of litigation attempted to advocate a change of its views. See *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 141-45 (1976); *Norwegian Nitrogen Produces Co.* v. *United States*, 228 U.S. 294 (1933). Nor, inasmuch as these particular transactions were scrutinized by the affected agencies

and found to constitute exempt "export sales," do I find persuasive the appellees' efforts to cite as if applicable the interpretation of the regulations given in factually distinguishable situations. *Cf. Tesoro Petroleum Corp.* Interpretation No. 78-10, ENFORCEMENT MANUAL (CCH) ¶ 56,400 (March 24, 1978) (equal volume exchange); FEA Interpretation 1977-16, 42 Fed. Reg. 31151 (June 20, 1977) (sale to instrumentality of United States for its consumption abroad).

The construction of the regulatory system by the administrative agency prior to the current litigation was, moreover, consonant with — if not mandated by — the language of the regulations, however adequately or inadequately those regulations may have considered the effect of a tri-partite arrangement such as here involved. It can hardly be doubted that the sales by the appellants to PETCO — sales of crude oil produced by a domestic company in the United States to an unrelated foreign company located in the Bahamas, for refining at Bahamian facilities — would in ordinary usage be considered an "export sale," the words of 10 C.F.R. § 212.53(a). This would be so even though a like quantity of refined products was destined by prearrangement for shipment into the United States — as an "import" free from price controls, to use the words of 10 C.F.R. § 212.53(b) — to a third company which the trial court found, under rulings not challenged in this interlocutory appeal, to be independent from and not an alter ego of the Bahamian company.

To be sure, words like "export sale" or "export trade" are not immune from consideration in the light of recognized principles of statutory and regulatory construction. See, *e.g.*, *United States* v. *Concentrated Phosphate Export Ass'n.*, 399 U.S. 199 (1968). [1] I find

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[1] In *Concentrated Phosphate*, sales of phosphate to the Republic of Korea in which an agency of the United States government "selected the commodity, determined the amount to be purchased, controlled the contracting process, and paid the bill," 393 U.S. at 208, were held not to be exempt from the anti-trust laws under the Webb-Pomerene Act. The Supreme Court, viewing the transactions as ones in which "the United States was, in essence, furnishing fertilizer to Korea," concluded that "it stretches neither the language nor the purpose of the Act" to hold that the imputed sales to the United States were subject to the anti-trust laws. *Id.* Unlike the case *sub*

unpersuasive, however, appellees' attempt to disavow its earlier interpretation that these sales to PETCO were "export sales" exempted from price controls, while continuing to acknowledge that they were "exports" exempted from the allocation regulations by 10 C.F.R. § 211.1(b)(1). It is unnecessary to consider the extent to which total congruency between the allocation and price regulations should be required; it is sufficient to note that an inconsistent interpretation such as appellees suggest should hardly be favored. As this Court has said, "Congress was conferring authority . . . to regulate only the price of that which it was mandating the President to allocate." *Shell Oil Co.* v. *FEA*, 527 F.2d 1243, 1246 (TECA 1975). One can hardly reconcile the present ruling, treating the transactions for purposes of price controls as if PETCO were a domestic refiner, with the earlier decision of the agency that for purposes of the allocation regulations "it is . . . not appropriate that [PETCO's refinery] which is located in a foreign country be treated as if it were located in the United States." See *New England Petroleum Corp.*, 2 FEA ¶ 83,136 at 83,429 (May 2, 1975), *aff'd*, 2 FEA ¶ 80,468 (August 7, 1975), *modified*, *New England Petroleum Corp.* v. *FEA*, 455 F.Supp. 1280 (S.D. N.Y. 1978).

Nor is there merit in the argument that a distinction in treatment of the same transaction under the allocation and price regulations can be justified on the basis that the exemption in the former is for "exports" while that in the latter is for "export sales." The difference is merely stylistic, as demonstrated by the fact that the same subsection of the pricing regulations also exempts sales to a domestic producer certified to be "for export," 10 C.F.R. § 212.53(a), and the next subsection of the regulations provides an exemption for "imports," 10 C.F.R. § 212.53(b). Indeed, as appellants note, the purported distinction based upon joinder of the words "export" and "sales" in § 212.53(a) would presumably mean that appellants' sales to PETCO were subject to price controls while PETCO's sales to NEPCO were

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judice, the court was not in that decision adopting a construction which would be at variance with interpretations adopted by the agency charged with enforcement of the law or in conflict with the other portions of the regulatory system.

not — with the bizarre result that, while NEPCO and its domestic customers would have remained subject to the higher prices, the so-called improper profits could have been made by a foreign company such as PETCO but not by domestic companies such as the appellants.

Those writing the regulations have, moreover, shown that they know how to provide special treatment, if that is desired, where there are interrelated transactions. See, *e.g.*, 10 C.F.R. § 212.82 (definition of "Exchange" in price regulations for refiners), § 212.92 (definition of "Matching purchase and sale" in price regulations for resellers and retailers). Indeed, after the transactions now in question had occurred, the regulations concerning export licenses were amended to provide, *inter alia*, for the consideration of the potential effect upon domestic prices prior to issuance of the license. See 15 C.F.R. § 377.6(d)(1).

D. *Propriety of Restitution.*

While the sales to PETCO were not, in my view, subject to price controls under the regulations as promulgated and construed by the enforcement agency, the majority's treatment of the issues concerning a remedy is more disturbing.

The trial court held that the amounts charged PETCO in excess of domestic price levels, estimated at $6,000,000 to $9,000,000, should be paid by the appellant sellers to the United States. The payment is not to be made as a civil penalty or fine; indeed, the trial court absolved the appellants from liability for the relatively modest civil sanctions imposed under 12 U.S.C. § 1904 n. § 208 for violation of the regulations. Rather, the award was described as one of "restitution" under § 209 of the Act, and was ordered paid into the treasury of the United States "because it cannot flow to the wronged individuals and because permitting the retention of the illegal overcharges would utterly frustrate the purposes of the EPAA." The court reached this conclusion after having decided that (1) restitution should not be made to PETCO, the company charged the excessive price by appellants, because of "unclean hands"; (2) restitution should not be made to NEPCO, which purchased from PETCO the refined products, for a like reason; (3) restitution should not be made to most of NEPCO's

customers because they passed on the overcharges to their customers; and (4) restitution could not, as a practical matter, be fairly apportioned among the vast number of consumers who ultimately bore the damage of higher prices. In a succinct statement of the rationale, the trial judge noted:

> "Realistically this holding very simply means that, since the people are sovereign, and where large numbers, here millions, have been injured, the peoples' institution, the United States government, will recover the disgorged wrongful profits."

The majority of the opinion of this court concludes, quite correctly in my view, that payment to the treasury of the United States "is not restitution in the true sense of the word or in the objectives of the statutes here involved." Restitution is a remedy in which restoration of the parties to their prior positions is sought to be effected by measuring relief on the basis of the improper benefits to the wrongdoer rather than on the basis of the damages to the injured party; it does not change traditional concepts as to the identity of the persons committing the wrong or sustaining the injury.

Nonetheless, the opinion apparently still leaves standing, under some vaguely defined notion of general equitable principles, the proposition that restitution should be paid to the government, to be held as if a constructive trust subject to directions of DOE. According to the instructions on remand, the government would have a "duty to try to ascertain those overcharged, and refund them, with interest, from the restitution funds"; it is left open for the district court to determine the extent, if any, to which the court would be involved in the implementation of a plan for distributing the amounts paid to the treasury. Any amounts not allocated and distributed to those found to have been overcharged — a task which the trial court has already found to be impracticable — would presumably escheat for all practical purposes to the government.

The approach of the majority, while lacking the simplicity and directness of that adopted in the district court, suffers in my opinion from the same fatal flaw — prescribing a judicial remedy for violation of the regulations which is beyond that authorized in the Con-

gressional enactment or the administrative regulations.[2] In place of the remedy constructed by the district court, which in essence intermingles the provisions of the Act relating to civil penalties with those relating to restitution, the panel has substituted a remedy which in essence melds the concept of a parens patriae action with that of a fluid recovery. In my opinion neither approach is warranted by applicable law and precedents[3] and each would have a far-reaching, untoward jurisprudential consequences.

If, as the district court held, restitution should not or can not be paid to those who purchased the products at an illegally high price — and if it is appropriate that this issue be considered by this court on this appeal — then I would hold that restitution should not be ordered, even if the result would be the retention of illegal gains.

I do not believe, however, that the question of restitution should be addressed on this interlocutory appeal under 28 U.S.C. § 1292(b). There has been no cross-appeal by the government under § 1292(b),

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[2] While not mentioned in the opinion of the district court or that of the majority, it may be noted that in 1979 the regulations were amended to provide special procedures for refunds *administratively* found due to injured persons where either the identity of the persons or the amount of the refunds could not readily be ascertained. 10 C.F.R. § 205.280 *et seq.*, 44 Fed. Reg. 8566. These regulations permit the rejection of claims too small to warrant individual consideration, § 205.286(b), and the payment of undistributed funds to the treasury or in any other manner approved by the OHA, § 205.287(c).

[3] While there have been cases providing for payment of funds into the treasury for distribution to those injured by statutory violations — such as *Hodgson* v. *Wheaton Glass Co.*, 446 F.2d 527 (3rd Cir. 1971); *Hansen* v. *United States*, 340 F.2d 142 (8th Cir. 1965); *Emery* v. *United States*, 186 F.2d 900 (9th Cir. 1951) — these have been situations where the identity of the payees and the amounts to be paid them had been resolved in the judicial proceedings brought by the government. Perhaps the case most nearly offering support for the panel's approach is the unappealed district court decision in *Oakland Raiders* v. *Office of Emergency Preparedness*, 380 F.Supp. 187 (N.D. Cal. 1974), directing that the balance of overcharges on football tickets that could not be paid to the persons overcharged be disgorged through reduction in the price of future ticket sales.

and there is no final judgment in the district court from which appeals might be taken on all issues which bear upon the proper relief, if any, to be granted on proof of statutory violations. Whether, for example, the appellants should have been absolved from liability for any civil penalty is not presently before this court. Nor are the many rulings of the district court — such as the impracticability of determining those who were wronged by the alleged overcharge, the barring of PETCO and NEPCO from any award on the basis of "unclean hands," and the barring from any award those which passed overcharges through to their customers [4] — which may well affect the propriety of an award of restitution. I would therefore hold that the question of restitution should not be considered on this appeal and would vacate the permission previously given for interlocutory appeal of this issue as having been improvidently granted.

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[4] But see *Eastern Airlines, Inc.* v. *Atlantic Richfield Co.*, 609 F.2d 497 (TECA 1979).

APPENDIX B

Civ. A. 77-101-P.

CITRONELLE-MOBILE GATHERING, INC., *et al.*,
Plaintiffs,

v.

JOHN F. O'LEARY, *etc.*, *et al.*,
Defendants.

United States District Court,
S.D. Alabama, S.D.
Sept. 15, 1980.

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT ON COUNTERCLAIM

PITTMAN, Chief Judge.

This action was filed by Citronelle-Mobile Gathering, Inc. and others, requesting declaratory and injunctive relief against officials of the Federal Energy Administration, now the Department of Energy, and the Secretary of the Department of Commerce.

The government filed a counterclaim seeking to compel Bart B. Chamberlain Jr. (Chamberlain), Citronelle-Mobile Gathering, Inc. (Gathering), and Citmoco Services, Inc. (Services) (hereinafter sometimes collectively referred to as "defendants"), to make restitution of alleged overcharges received relating to four transfers of crude petroleum to Grand Bahamas Petroleum Company, Ltd. (PETCO), a wholly owned subsidiary of the New England Petroleum Corporation (NEPCO), between December 20, 1973 and May 26, 1974. The first three shipments were sold at a price of $14.00 per barrel and the final shipment at $13.00 per barrel, prices admittedly higher than the price the defendants could lawfully have charged had the sales been made in the United States to United States purchasers.

The government seeks to recover the difference between the payments the defendants actually received and the maximum lawful selling prices allowed by the provisions of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 note (ESA); the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 751 *et seq.* (EPAA); and the regulations promulgated thereunder which establish the ceiling price for the first sale of domestic crude oil, and the maximum lawful selling price for the resale of domestic crude oil, 6 C.F.R. Part 150 and 10 C.F.R. Part 212. The government also seeks a declaratory judgment that the defendants violated the laws in question, and to recover civil penalties and costs from the defendants.

All parties have filed motions for summary judgment on the counterclaims. They informed the court there were no disputed facts. None were filed as required by Local Rule 8:

> When a motion for summary judgment is filed . . . if it is contended that there are material factual disputes, [the party] shall point out the disputed facts appropriately referenced . . . . Failure to do so will be considered an admission that no material factual dispute exists.

FINDINGS OF FACT

The defendants Gathering and Services are corporations duly organized and existing under the laws of the State of Delaware, having their principal place of business in Mobile, Alabama. The companies are commonly controlled and were, at all times pertinent hereto, engaged in the business of purchasing crude oil produced principally in the Citronelle field in Mobile County, Alabama, and reselling that crude oil at Mobile, Alabama. Defendant Chamberlain is an officer, director and the principal stockholder, owning a majority of the stock, of the companies. He is a citizen and resident of the State of Alabama.

James R. Schlesinger, Secretary of the Department of Energy, is successor to John F. O'Leary, former Administrator of the Federal Energy Administration (FEA); Donald E. Allen was Regional Administrator, Region IV of FEA, at the time of commencement of this action. Juanita M. Kreps is the Secretary of Commerce of the United States.

Pursuant to the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751 *et seq.*, and Executive Order 11748, the Federal Energy Office (later the FEA and now the Department of Energy) issued regulations governing the allocation and pricing of crude oil and refined petroleum products, published at 10 C.F.R. Parts 205, 210, 211, 212 (effective January 14, 1974). At all times relevant hereto, prior to the effectiveness of the FEA regulations, pricing and crude oil was subject to regulations of the Cost of Living Council (CLC), 6 C.F.R. Part 150 issued pursuant to the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note.

Exports, and domestic sales for export, of crude petroleum subject to export license regulations of the Department of Commerce (DOC) were and are expressly excluded from FEA's petroleum allocation regulations, 10 C.F.R. § 211.1. Prices charged for export sales, including sales to a domestic purchaser which certifies the product is for export, are exempt from FEA's petroleum pricing regulations, 10 C.F.R. § 212.53.

From time to time during the period December 1973 to April 1974, the defendant companies contracted with Grand Bahamas Petroleum Company, Ltd. (PETCO) to sell crude oil to PETCO, at a price higher than the domestic price permissible under otherwise applicable FEA regulations, for refining in the Bahamas at a refinery partly owned by PETCO. During this period applications for a license were made to and approved by DOC as follows:

On or about December 20, 1973, Gathering filed an application for a license to export 250,000 barrels of crude oil to PETCO in the Bahamas. On or about December 21, 1973, this application was approved and a validated export license (No. C-31226-701-1) issued on December 26, 1973, as requested in the application.

On or about December 20, 1973, Gathering filed a second application for a license to export 250,000 barrels of crude oil to PETCO in the Bahamas. On or about January 2, 1974, the second application was approved and validated export license (No. B 400102-266-1) issued as requested in the application.

On or about January 17, 1974, Gathering filed an application to amend the first application to include an additional quantity of crude oil, which amendment was approved on January 18, 1974.

On or about February 22, 1974, Gathering filed an application for a third license to export 250,000 barrels of crude oil to the Bahamas. On or about February 25, 1974, the third application was approved and a validated export license (No. C-40226-703-1) issued to Gathering as requested in that application.

On or about April 2, 1974, Services filed an application for a license to export 250,000 barrels of crude oil to the Bahamas. On or about April 12, 1974, this fourth application for export license was approved and a validated export license (No. 40416-708-1) issued on April 15, 1974, for the shipment of 184,000 barrels of crude oil to the Bahamas.

Each application for export license disclosed that a volume of refined petroleum equivalent to the quantity of crude oil to be exported would be re-exported from the Bahamas to the United States by PETCO. The applications for the export licenses and the amendment issued to Gathering and Services truthfully set forth all facts upon which the Office of Export Administration of DOC issued the export licenses and the amendment. No export license or amendment thereto was issued to or approved for the defendant companies or either of them, or for Bart B. Chamberlain, Jr., at any time in 1973 or 1974 other than those above identified. None of the export licenses or amendments thereto identified above was at any time revoked or cancelled.

Pursuant to the four export licenses issued to the defendant companies above identified, and to Commerce Department Export regulations allowing for 10% tolerance in shipments pursuant to export licenses, crude oil was shipped from Mobile, Alabama, to Freeport, Bahamas, during the period January 1974 to May 1974 as follows:

a. On or about January 6, 1974, Gathering shipped 279,000 barrels of crude oil from Mobile to Freeport.

b. On or about January 22, 1974, Gathering shipped 255,000 barrels of crude oil from Mobile to Freeport.

c. On or about February 25, 1974, Gathering shipped 231,000 barrels of crude oil from Mobile to Freeport.

d. On or about May 26, 1974, Services shipped 200,000 barrels of crude oil from Mobile to Freeport.

The defendants were paid by PETCO for the first three shipments at the agreed-upon price of $14.00 per barrel, and for the last shipment at the agreed-upon price of $13.00 per barrel.

I. Parties to the Transactions

Defendant Citronelle-Mobile Gathering, Inc. operates an oil pipeline in the Citronelle oil field in southwest Alabama. It also purchases crude oil for resale. Defendant Citmoco Services, Inc. operates a terminal facility in the Citronelle field; it has purchased crude oil for resale as well. Defendant Bart B. Chamberlain, Jr. owns approximately 90% of Gathering, and 87.5% of Services. He owns the largest working interest in the Citronelle field among some 900 owners. Chamberlain Testimony at 18-20, 23, 50-51.

New England Petroleum Company (NEPCO) is a New York corporation with its headquarters in New York. NEPCO's primary business is the sale of No. 6 heating oil in the United States. NEPCO depended primarily, but not exclusively, for its supply of No. 6 heating oil on Grand Bahamas Petroleum Company (PETCO), its wholly-owned Bahamian-incorporated subsidiary. PETCO arranges for the refining of its crude oil by Bahamas Oil Refining Company (BORCO), a Bahamian partnership. BORCO is owned by two entities. The first is "PETCO Parntership," which is a partnership of two NEPCO subsidiaries, Grand Bahamas Petroleum Company and PETCO, Ltd., an "offshore" corporation. The subsidiaries through this partnership own 50% and 15%, respectively, of BORCO. The remaining 35% is owned by Chevron Oil of the Bahamas, Ltd., a subsidiary or affiliate of Standard Oil of California. Costikyan Dep. at 25, 74; Covert Dep. at 9; Jackson Dep. at 29; Lauria Dep. (May 29, 1979) at 63-64.

PETCO purchased crude oil for its own account, had BORCO refine it, and sold the product to NEPCO and other companies. PETCO extended 90-day credit terms to NEPCO. The two companies performed a reconciliation each month, disposing of the oldest invoices. NEPCO generally had a liability on the account, and would periodically transfer funds, usually by telegraph, to reduce the balance. Covert Dep. at 32; Lauria Dep. (May 29, 1979) at 16, 31-32, 73; Lauria Dep. (Aug. 1, 1979) at 53-56, Exhs. 1A-3B.

PETCO maintained funds in the normal course of business to pay its liability for purchases of crude oil. NEPCO would occasionally pay PETCO's debts. Such a transaction would be credited to NEPCO's current account. This was a standard practice between the companies. Lauria Dep. (May 29, 1979) at 30; Lauria Dep. (Aug. 1, 1979) at 54-55, 63.

The date of PETCO's formation is not in evidence. It was probably formed before 1970, the year in which BORCO was formed. Tax considerations were at least part of NEPCO's motivation in creating the PETCO subsidiary. Transcript of telephone conversation between Ted Jackson of NEPCO and Chamberlain of Dec. 27, 1973, Jackson Dep. Gov't. Exh. 4.

PETCO and BORCO initially had accounts with Barclays Bank International in New York and Freeport, Bahamas. Because the Citronelle transactions were accomplished by means of letters of credit with First National City Bank of New York, PETCO later opened an account with that bank. Each company kept separate books. Lauria Dep. (May 29, 1979) at 13-14.

Beyond NEPCO's payment of some PETCO debts, the companies shared some functions and personnel. NEPCO's concern was to maximize profits for the entire group. The internal auditing department at NEPCO audited the books for all companies within the group. NEPCO's treasury department would often assist PETCO in arranging financing and letters of credit with New York banks. Berdy Dep. at 16; Jackson Dep. at 45-46, 48-49; Lauria Dep. (Aug. 1, 1979) at 70.

Edward M. Carey, Sr. was the sole stockholder and president of Carey Energy Corporation, of which NEPCO, and therefore PETCO and BORCO, were subsidiaries. Carey was president of NEPCO, a director of PETCO, and a member of the BORCO partnership committee. Each company had its own employees for basic functions such as controller, treasurer, and supply logistics, although as noted above, NEPCO personnel were sometimes enlisted to aid in PETCO transactions. Berdy Dep. at 7-8; Costikyan Dep. at 15; Covert Dep. at 11-12, 28; Lauria Dep. (May 29, 1979) at 11-12.

Apart from sharing certain functions and personnel, it is clear that PETCO was an independent entity, and not an alter ego for NEPCO.

II. The Transactions

The four shipments of crude oil were made pursuant to an oral agreement negotiated by Edward M. Carey, Sr. on behalf of PETCO and by defendant Bart B. Chamberlain, Jr. on behalf of Gathering and Services. The agreement was implemented by three letters. The first, written on or about December 20, 1973 from Gathering to PETCO, provided for two shipments of 250,000 barrels each, on or about December 29, 1973 and January 25, 1974. The second letter, written on or about February 14, 1974 from Gathering to PETCO, provided for one 250,000-barrel shipment during February 22 to 26, 1974. The third letter, written on or about March 27, 1974 from Services to PETCO, provided for one 250,000-barrel shipment during April 6 to 10, 1974. The following shipments were made:

Date	Barrels	Invoice Price/Bbl	Price/Bbl in 60 days
1/7/74	279,213.47	4.35	9.65 (3/6/74)
1/23/74	254,640.86	5.35	8.65 (3/22/74)
2/27/74	231,442.72	5.35	8.65 (4/26/74)
5/27/74	199,812.86	5.35	7.65 (7/25/74)

Doc. No. 109; Berdy Dep. at 5; Jackson Dep. at 63-75, Gov't. Exhs. 12-15.

NEPCO paid all or part of the first invoice, and part of the second and third invoices. PETCO paid part of the second and third invoices, and all of the fourth. NEPCO's payments were credited to its account with PETCO. Berdy Dep. at 31, 39, Gov't. Exh. 12; Lauria Dep. (May 29, 1979) at 35-36, 39 Exh. 1; Lauria Dep. (Aug. 1, 1974) at 63-64, 66.

All second portions of the payments were made by means of letter of credit established in favor of Gathering and Services, and on behalf of PETCO, with First National City Bank of New York. One application for such a letter was signed by T. C. Covert as General Manager of PETCO. Ted Jackson and Denton DeBaun, NEPCO employees,

negotiated the letters of credit on behalf of PETCO. Because of the overloading on the first shipment which required an amendment to the export certificate, the letter of credit had to be increased. This was done at the request of Ted Jackson in a letter of January 7, 1974 to First National City Bank, written on NEPCO stationery. Berdy Dep. at 20, 40; Jackson Dep. at 20-23, 26, 38, Gov't. Exh. 2.

At the request of First National City Bank, NEPCO guaranteed PETCO's indebtedness on the letters of credit. This was a "continuing guarantee" signed by DeBaun. NEPCO also assisted PETCO in establishing an account at that bank so that the letter of credit could be paid. Such guarantees and assistance were routine. Berdy Dep. at 24-25, 36; DeBaun Dep. at 5; Jackson Dep. at 29, 44, Gov't Exh. 3, 6, 7, 9.

The only question regarding these transactions which is substantially controverted is whether Carey negotiated the agreements on behalf of PETCO or on behalf of NEPCO. The government asserts that Carey negotiated on behalf of Carey Energy Corporation, NEPCO, PETCO and BORCO. Had the contracts been between the defendants and Carey Energy or NEPCO, of course, the transactions would clearly have been domestic in all material elements. The government's argument, however, proves too much. Carey was a director of PETCO, and might as well have acted for PETCO as for any of his other companies. That the companies were operated for their common benefit does not permit this court to ignore their existence. There is no evidence that PETCO was not maintained as a separate entity from other members of the group, or that there was no valid business purpose for its existence. Notwithstanding the significant involvement of NEPCO in the transactions, this court finds that Carey acted on behalf of PETCO in purchasing the crude oil.

Carey aided and abetted the defendants in securing the export licenses. It must be viewed that Carey acted on behalf of his interested companies to the mutual benefit of them and the defendants.

The defendants prepared affidavits in support of their applications for export licenses, which stated that the volume of refined products available in the United States would not be reduced. These were signed by T. C. Covert for PETCO, Edward M. Carey, Sr. for

NEPCO, and David M. Tappen as Vice President of both Gathering and Services. Each affidavit stated in substance

> that such crude oil will be processed in the [BORCO] refinery into various petroleum products, all of which will be exported from the Bahamas to the United States of America.

Counterclaimant's Exh. 1 (Covert affid.); *see* Counterclaimant's Exhs. 2-12.

The export licenses for the first three shipments were issued by the Department of Commerce. The fourth license, however, was issued only after negotiation with Commerce officials. Their reluctance to issue the fourth license was apparently based on two grounds; first, that the Alaskan Pipeline Act prohibited export of any oil crossing federal rights of way, and second, that domestic refineries were operating at 76% of capacity. Meyer Dep. Exh. 1. Chamberlain, on behalf of Gathering and Services, substituted 30,000 barrels purchased in the Citronelle field from Miller Oil Company for 96,000 barrels purchased from Permian Company which had crossed a federal right of way. Chamberlain argued that the companies had relied upon the gathering of past applications in the planning for the fourth shipment. He further argued that if the license was not granted, flow from the Citronelle field would have to be stopped because of lack of storage capacity. This would have resulted in a permanent loss of part of the oil in the field, because the system is operated by water recovery.

The license was issued for 184,000 barrels plus or minus ten percent, or 250,000 barrels adjusted as described above. Meyer testified that the Department of Commerce granted the fourth application only because it concluded that it had no choice under its regulations:

> We did not specifically spell out in the regulations how we would handle applications for export of crude oil that did not cross federal rights of way, and furthermore, we had previously issued licenses for three more or less identical transactions, and the phase of the regulations, and the phase of our practice, we were in no good legal position to say no to the fourth application.

Meyer Dep. at 22.

In a memorandum concerning the fourth application dated April 24, 1974, Meyer noted that

> Price was not considered in the processing of the three applications noted above. New information provided on March 8, 1974, by the Federal Energy Office (FEO) gave cause to hold the April 2 application submitted by CITMOCO Services, Inc. The FEO has reason to believe, and IRS is presently investigating, that the applicant may be violating FEO price and supply regulations.

Meyer Dep. Exh. 1 at 2-3.

III. Delegation of Authority

A letter of December 10, 1973 from Secretary of Commerce Frederick B. Dent to William E. Simon, head of the Federal Energy Office, states:

> This will confirm your decision of Friday afternoon directing that the Department of Commerce initiate a system of export controls on petroleum products to fulfill the President's responsibility under "The Emergency Petroleum Allocation Act of 1973."
>
> To simplify administrative procedures and avoid the necessity of publishing a new set of rules for comment, we propose moving under the authority granted us under the Export Control Act, but will fulfill in toto the export controls required by the Emergency Petroleum Allocation Act of 1973.

This letter establishes that the Department of Commerce assumed responsibility for export controls under the EPAA. *See* Exec. Order No. § 11748, § 8, 38 Fed.Reg. 33575 (1973). Commerce in fact promulgated regulations, in Export Administration Bulletin No. 106 (Dec. 13, 1973) (then codified at 15 C.F.R. § 377. FEO allocation regulations expressly deferred to these export controls. 15 C.F.R. § 211.1(b)(1)(1973). *See generally* Plaintiffs' [defendants to counterclaim] Exh. No. 10 of May 30, 1977, Appendix B (Subcomm. on Oversight and Investigations, House Comm. on Interstate and Foreign Commerce, 94th Cong. 2d Sess., Alleged Political Pressure to Obtain Export Licenses for Crude Oil (Mar. 1976)).

Price regulations, however, were not affected by this delegation, and remained within the jurisdiction of the FEA. The FEA and the Cost of Living Council promulgated rules for the "export sales"

provisions of EPAA and ESA regulations. *See* CLC Ruling 1973-3, 38 Fed. Reg. 17523 (1973); CLC Ruling 1974-3, 39 Fed.Reg. 10152 (1974); Special Rule No. 7, 41 Fed. Reg. 18646 (1976); FEA Interp. 1977-16, 42 Fed.Reg. 31151 (1977).

The use of the words "export controls" in Secretary of Commerce Dent's letter may be traced to the Export Administration Act of 1969, Pub.L.No.91-184, § 3(2) & (3), 83 Stat. 841, and the Export Administration Act of 1972, Pub.L.No.92-412, Tit. I, § 103(6), 86 Stat. 644. Section 3(2) provides, in part:

> It is the policy of the United States to use *export controls* (A) to the extent necessary to protect the domestic economy from the excessive drain of scarce materials. . . .

Pub.L.No.91-184, § 3(2), 83 Stat. 841 (emphasis added). Neither the 1969 act nor the 1972 amendments in force when Secretary Dent wrote his letter provided for regulation of price by the Department of Commerce. "Export controls" referred only to regulations "prohibit-[ing] or curtail[ing] . . . exportation," *id.* § 4(b), not to price regulation. Similarly, the Export Control Act of 1949, ch. 11, §§ 2, 3, 63 Stat. 7, did not provide for price regulation. Secretary Dent proposed "moving under the authority granted [to the Department of Commerce] under the Export Control Act." This court only have referred to allocation regulations, and not price regulations.

The defendants note two amendments to export control regulations which, they argue, demonstrate that the Department of Commerce assumed jurisdiction of price as well as allocation controls. This argument is to no avail. The April 18, 1974 amendment adding 15 C.F.R. § 377.6(d)(1)(ii)(c) dealt only with an additional requirement for an exemption from the prohibition on oil exports. The October 1, 1975 amendment, after these transactions, to that subsection, 40 Fed.Reg. 45159 (1975), was promulgated on the premise that price controls under the EPAA had expired. *See* 40 Fed. Reg. 40507 (1975). *See generally Citronelle-Mobile Gathering, Inc.* v. *Gulf Oil Corp.*, 420 F.Supp. 162 (S.D.Ala.1976), *remanded*, 578 F.2d 1149 (5th Cir. 1978), *appeal dism'd*, 591 F.2d 711 (Em.App.1979), *cert. denied*, 444 U.S. 879, 100 S.Ct. 168, 62 L.Ed.2d 109 (1979). The published explanation noted "the expiration . . . of the allocation and price control systems administered by the Federal Energy Administration." 40 Fed.Reg. at 45159.

IV. Tracing Crude Oil and Product

The defendants by affidavit represented to the Department of Commerce that the products which were refined from Citronelle crude would be exported to the United States. The court finds that they were in fact exported to the United States. [1]

The task of determining the path of the product to the United States is extraordinarily complex, but not impossible. The court does not at this time have sufficient information to determine which of NEPCO's customers were affected by the alleged overcharges. An expert could, however, reach reasonable conclusions about where the product went. *See* Costikyan Dep. at 66-68; Covert Dep. at 27-28, Exhs. 12-18. *But see* Lauria Dep. (June 22, 1979) at 47 ("purely theoretical numbers").

NEPCO's customers were primarily utlities on the East Coast from Florida to Massachusetts. They included: Tampa Electric Company, Jacksonville Electric, Georgia Power Company, Public Services Gas & Electric, Virginia Electric Power, Orange & Rockland, Philadelphia Electric, Consolidated Edison, Long Island Lighting, New Bedford, and New England Gas & Electric. Costikyan Dep. at 16-27; Lauria Dep. (June 22, 1979) at 6-11. Seventy to eighty percent of NEPCO's product went to these utilities. The other twenty to thirty percent was sold to a New York retailer, Burns Brothers, New England and New Jersey retailers, and Canadian companies. Costikyan Dep. at 30-32. At some ports, deliveries were made for one customer, while in New York, for example, deliveries might be made for redelivery to a number of the utilities. *See* Lauria Dep. (June 22, 1979) at 7, 19. The Department of Energy is currently conducting an audit of NEPCO's books in an attempt to determine which customers received product from Citronelle crude. Doc. No. 109.

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[1] Whether "the same molecules" returned to the United States, of course, is unlikely. *See* Chamberlain Testimony at 183, 187. Although the BORCO partners were credited based on specific deliveries of crude, and ran their crude separately, similar types of crude were sometimes commingled, each partner taking its share. Costikyan Dep. at 20-21, Exh. 2; Lauria Dep. (May 29, 1979) at 64; Lauria Dep. (June 22, 1979) at 33.

The type of product requested varied from customer to customer, depending upon sulphur content, pour point, and viscosity. Covert Dep. at 25. [2]

V. Other Findings

Some records maintained with regard to these transactions by NEPCO, PETCO and BORCO have been destroyed in the ordinary course of those companies' business. Costikyan Dep. at 66-68; Lauria Dep. (May 29, 1979) at 33. It appears, however, that substantial records, or the recollection of company employees, is still available. Costikyan Dep., Exh. 2; Covert Dep. at 27-28, Exhs. 12-18. The court concludes that, at this point at least, the defendants have not been substantially prejudiced by any delay on the government's part in bringing its counterclaim.

CONCLUSIONS OF LAW

The court has jurisdiction over the subject matter of this counterclaim pursuant to §§ 208, 209 and 211 of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note, as incorporated in § 5(a) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 754(a), and pursuant to § 502(b) of the Department of Energy Organization Act, 42 U.S.C. § 7192(b).

I. Limitations

The defendants contend that the government's claim for restitution under § 209 of the Economic Stabilization Act is barred by Alabama Code § 6-2-39(5), which provides for a one-year limitation on

> [a]ctions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section . . . .

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[2] Sulphur content requirements ranged from Con Ed's 0.30% to Georgia Power's 1.00%. Citronelle crude, 0.75% sulphur, is intermediate in sulphur content. To meet customer specifications, Citronelle product was blended either with low-sulphur or high-sulphur product. Costikyan Dep. at 34-39, Exh. 5; *see* Covert Dep. Exh. 12.

This contention finds some support in *EEOC* v. *Griffin Wheel Co.*, 511 F.2d 456 (5th Cir. 1975), *clarified*, 521 F.2d 223 (5th Cir. 1975), where the court stated that a claim for back pay filed by the EEOC on behalf of employees was a "private action" subject to the statute of limitations. However, in *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 366 n.22, 97 S.Ct. 2447, 2454 n. 22, 53 L.Ed.2d 402, 411 n. 22 (1977), an enforcement action by the EEOC which included a claim for back pay (*see EEOC* v. *Occidental Life Ins. Co.*, 535 F.2d 533, 537 (9th Cir. 1976), *aff'd*, 432 U.S. 355, 97 S.Ct. 2447, 53 L.Ed.2d 402 (1977)), the Supreme Court held that a state statute of limitations would not be applied where its application would "frustrate or interfere with the implementation of national policies," or would be "inconsistent with the underlying policies of the federal statute." 432 U.S. at 367, 97 S.Ct. at 2455, 53 L.Ed.2d at 412.

The purposes expressed in § 2 of the Emergency Petroleum Allocation Act, 15 U.S.C. § 751, to prevent economic dislocations caused by oil shortages, are clearly national in scope. This court has previously stated that "the urgency and importance of the energy issue to the nation and its economy cannot be doubted." *Citronelle-Mobile Gathering, Inc.* v. *Gulf Oil Corp.*, 420 F.Supp. 162, 170 (S.D.Ala.1976), *remanded*, 578 F.2d 1149 (5th Cir. 1978), *appeal dism'd*, 591 F.2d 711 (Em.App.1979), *cert. denied*, 444 U.S. 879, 100 S.Ct. 168, 62 L.Ed.2d 109 (1979).

Enforcement actions under the EPAA and ESA, like those under the Equal Employment Opportunity Act, are "actions brought by the federal government to vindicate combinations of private and public interests." *Marshall* v. *Intermountain Elec. Co.*, 614 F.2d 260 (10th Cir. 1980) (OSHA). The Temporary Emergency Court of Appeals has held that restitution in ESA enforcement actions is " 'appropriate and necessary to enforce compliance.' " *Univ. of Southern California* v. *Cost of Living Council*, 472 F.2d 1065, 1070 (Em.App.1972). As an element of the government's enforcement power, a claim for restitution under the EPAA is not subject to the Alabama statute. [3]

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[3] Similarly, the Price Administrator's claim for restitution under § 205(a) of the Emergency Price Control Act of 1942 was characterized as an enforcement remedy. The court stated:

Occidental Life held that a claim by the government for restitution may be subject to the defense of laches. *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. at 372-73, 97 S.Ct. at 2457, 53 L.Ed.2d at 415. As the court has found that the defendants have not been prejudiced by any delay, this defense has not been made out.

II. Jurisdiction

Although the government's counterclaim does not include a prayer for injunctive relief, this court nevertheless has subject matter jurisdiction of the claim for restitution. Section 209 of the ESA provides that,

> In addition to . . . injunctive relief, the court may also order restitution of moneys received in violation of any . . . order or regulation.

12 U.S.C. § 1904 note.

The defendants contend that this language demonstrates Congress' intent that federal courts have jurisdiction of a claim for restitution only when it is joined with a prayer for injunctive relief. The statute does not demand, nor does any policy of the ESA commend, such a result. *See United States* v. *Pro Football, Inc.*, 514 F.2d 1396 (Em.App.1975) (restitution only); *cf. Creedon* v. *Randolph*, 165 F.2d at 919-20 (EPCA).

Section 209 provides for three types of relief: traditional injunctions, mandatory injunctions, and restitution. The drafters em-

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> That it operates to confer a benefit on the tenant . . . does not detract at all from the enforcement effect nor alter its nature.

Creedon v. *Randolph*, 165 F.2d 918, 919 (5th Cir. 1948) (citing *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946)); *cf. Chris-Craft Ind., Inc.* v. *Piper Aircraft Corp.*, 480 F.2d 341, 390-91 (2d Cir. 1973) (SEC enforcement action), *cert. denied*, 414 U.S. 910, 94 S.Ct. 231, 38 L.Ed.2d 148 (1973); *S.E.C.* v. *Manor Nursing Ctrs.*, 458 F.2d 1082, 1104 (2d Cir. 1972).

Ashland Oil Co. v. *Union Oil Co.*, 567 F.2d 984, 989 (Em.App.1977), cited by the defendants, is inapposite. That case was a private action for damages under § 210 of the ESA.

ployed the words "also" and "[i]n addition to" in order to give grammatical sense to the statute; the words were not intended by Congress to require that each form of relief be available and prayed for before a mandatory injunction or restitution could be granted. The legislative history of the 1971 amendments, further, indicates that Congress intended to clarify the courts' power to grant restitution, and not to limit it:

> It was not certain that, in these circumstances, there was an inherent equitable power in the court to set things right and order restitution. . . . This provision makes clear that the court has power to grant restitution.

S.Rep.No.507, 92d Cong., 2d Sess. (1971), *reprinted in* [1971] U.S. Code Cong. & Admin.News pp. 2283, 2291.

Section 209 authorizes an action by the government "[w]henever it appears . . . that any individual or organization *has engaged*, is engaged, or is about to engage" in a violation of the ESA. 12 U.S.C. § 1904 note (emphasis added). Ancillary equitable relief such as restitution is clearly available for a past violation of the Act. It may be the only relief available for a past violation where, as here, the allegedly unlawful activity has ceased and no injunction is available. *See, e.g., United States* v. *Oregon State Med. Soc'y*, 343 U.S. 326, 334, 72 S.Ct. 690, 696, 96 L.Ed.978, 985 (1952).

Further, the Temporary Emergency Court of Appeals has repeatedly measured the powers conferred by the ESA and EPAA "by the broad purposes of the Congressional mandate." *Bonray Oil Co.* v. *Department of Energy*, 472 F.Supp. 899, 904 (W.D.Okl.1978), *aff'd*, 601 F.2d 1191 (Em.App.1979). Limiting the availability of restitution as proposed by the defendants would strictly limit an enforcement tool which Congress was careful to provide for in actions under the ESA. *Cf. SEC* v. *Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1104 (2d Cir. 1972) (SEC enforcement action). This court therefore concludes that the government may maintain an enforcement action for restitution in the absence of other claims for relief.

III. Liability of Defendant Chamberlain

Chamberlain is sued as a "producer" subject to price ceilings contained in 6 C.F.R. Part 150, Subpart L, and 10 C.F.R. Part 212,

Subpart D. Any overcharges which he received in sales which violated the EPAA would be subject to restitution.

When a corporate officer or director is a central figure in tortious conduct, or when he authorizes, participates and approves of that conduct, he is subject to liability based upon that conduct. *L.C.L. Theatres, Inc.* v. *Columbia Pictures Ind., Inc.*, 619 F.2d 455 (5th Cir. 1980); *accord, Donsco, Inc.* v. *Caspar Corp.*, 587 F.2d 602, 605-06 (3rd Cir. 1978); *Tillman* v. *Wheaton-Haven Rec. Ass'n*, 517 F.2d 1141 (4th Cir. 1975); *Davis H. Elliot Co.* v. *Carribean Utilities Co.*, 513 F.2d 1176, 1182 (6th Cir. 1975); *Murphy Tugboat Co.* v. *Shipowners & Merchants Towboat Co.*, 467 F.Supp. 841, 851-54 (N.D.Cal.1979); *see Restatement (Second) of Agency* § 343 (1958). This doctrine does not depend upon the same grounds as piercing the corporate veil, that is, inadequate capitalization, use of the corporate form for fraudulent purposes, or failure to comply with formalities of organization. *L.C.L. Theatres, Inc.* v. *Columbia Pictures Ind., Inc.* 619 F.2d at 457; *Donsco, Inc.* v. *Caspar Corp.*, 587 F.2d at 606. Rather, the officer or director is liable as an actor, not an owner. *Id.*

Chamberlain was a central figure in the sales of crude oil by Gathering and Services. He is therefore subject to liability for any violations of the EPAA in those sales. Because restitution is predicated upon a finding of unjust enrichment, however, Chamberlain would be individually liable only to the extent that he received proceeds from those sales. *See 1* G. Palmer, *Law of Restitution*, §§ 2.1, 2.10 (1978).

IV. Violation or Exemption

The four shipments of crude oil were subject to Subchapter B, Chapter III of Title 15 of the Code of Federal Regulations, as effective on the dates of shipment. The export licenses and the amendment issued to Gathering and Services were issued pursuant to the requirements of Subchapter B, Chapter III of Title 15 of the Code of Federal Regulations. Ten C.F.R. § 211.1(b)(1), as effective during the period from January 15, 1974 through May 30, 1974, provided:

> Exports of crude petroleum and petroleum products subject to Subchapter B of Chapter III of Title 15 of the Code of Federal Regulations are excluded from this part. [Part 211]

Petroleum prices were goverened by 6 C.F.R., Part 150 from December 15, 1973 through January 14, 1974, and by 10 C.F.R. Part 212 from January 15, 1974 through May 30, 1974. Title 6, § 150.54(d)(1) provided:

> The prices charged for export sales including the sale of products to a domestic purchaser who certifies that the product is for export are exempt.

Title 10, § 212.53(a) provided:

> The prices charged for export sales of covered products including sales to a domestic purchaser which certifies the product is for export are exempt.

Whether the defendants violated the price regulations of Title 10, Part 212 depends upon the construction of the words "export" in § 211.1(b)(1) and "export sale" in § 150.54(d)(1) and § 212.53(a). If the terms are equivalent, then there was no violation because the transactions were exempted by the export licenses. If all "exports" are not "export sales," then any charges over the ceiling price would have been received in violation of the price regulations. [4]

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[4] During the relevant period, CLC, FEO, and FEA price regulations applicable to producers of crude oil established a two-tier pricing system. Under this system, a producer was required to determined a base production control level (BPCL) for each property based upon production and sale of crude oil from that property in each month of 1972. That portion of production and sale from a particular property equal to or below the BPCL was termed "old" oil and was subject to a ceiling price comprised of the "posted price" on May 15, 1973, plus $0.35 ($1.35 after December 18, 1973) per barrel. Crude oil produced and sold in excess of 1972 production levels was termed "new" oil and could be sold without regard to the ceiling price imposed on "old" oil. In addition, for each month in which "new" oil was produced and sold, an equal amount of "old" oil was released from the constraints of the ceiling price ("released" oil). During all relevant times, the ceiling price of "old" oil produced from the Citronelle field was $4.10, and after December 19, 1973, $5.10 per barrel.

Section 4(b)(1)(F) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 753(b)(1)(F), authorizes regulations which provide for "equitable distribution of . . . refined petroleum products at equitable prices." Section 202 of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note, states Congress' finding

> that in order to stabilize the economy, reduce inflation . . . and protect the purchasing power of the dollar, it is necessary to stabilize prices . . . and that in order to . . . assure sufficient supplies of petroleum products to meet the essential needs of various sections of the Nation, it is necessary to provide for the rational and equitable distribution of those products.

The allocation and price regulations had been administered according to different criteria even prior to the transactions at issue. In a July 2, 1973 ruling, the Cost of Living Council stated that the purpose of the "export sale" exemption was

> to allow sales of exports which will produce revenue from foreign sources to be made at the highest price. Transactions which will not produce such revenue shall, therefore, not be considered exports for the purpose of exemption from the regulations under the economic stabilization program.

CLC Ruling 1973-3, 38 Fed.Reg. 17523 (1973). A CLC ruling of March 18, 1974 is in accord. CLC Ruling 1974-3, 39 Fed.Reg. 10152 (1974). The allocation regulations in Part 211 expressly deferred to Department of Commerce determinations of what constituted an export. No such provision is found in Part 212, or in Part 150 of Title 6.

The defendants place great weight upon the letter from Commerce Secretary Dent to FEO Administrator Simon, confirming the delegation of EPAA authority, to support their argument that FEO retained no jurisdiction over price controls. In view of the confused state of the administration of the newly-enacted Emergency Petroleum Allocation and Alaskan Pipeline Acts, the question of delegation is difficult. Taken in the broadest sense, however, "control" of products to be exported may be divided among several agencies. *See, e.g.*, Export Administration Act, 50 U.S.C.App. §§ 2403-2404. The CLC's successor agencies inherited that agency's price regulations, along with at least one published ruling on the "export sales" provision. It is

reasonable to conclude that the agencies contemplated that a delegation of the "export control" function might not include all controls under the EPAA. The prior history of export control statutes suggests that the term "export controls" did not include price regulations. [5]

The defendants have not suggested that the export licenses by their terms exempted the four transactions from the price controls of Title 6, Part 150 and Title 10, Part 212. They rely instead on the argument that the "export sales" provision is coextensive with the "exports" exemption of Part 212. This position finds no support in the development of the regulations in Parts 211 and 212, which had begun well before these transactions. The inclusion within the term "export sales" of certain domestic transactions where the product is destined for export suggests that the two terms have different meanings.

Finally, these transactions had precisely the effect which Congress sought to avoid in enacting the EPAA. The EPAA and ESA do not call upon this court to determine whether the transactions caused a "net increase in the balance of payments," whether the alleged benefits to the Citronelle field actually accrued, or whether the transactions were a "good thing." Such a determination would be a judgment on the wisdom of the enactment itself, and is a question for Congress. The court must determine whether the transactions were exempted from pricing regulations by the export license. They were not.

The Supreme Court has cautioned, in *United States* v. *Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968), that courts should "look at the economic reality" of transactions to determine their effect. Thus, the court held that

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[5] That Commerce represented that it would fulfill "in toto" the requirements of the EPAA suggests that it did not fully comprehend the scope of that act, not that it intended to adopt price regulations. *See* Plaintiffs' [defendants to counterclaim] Exh. No. 10 of May 30, 1977 (Subcomm. on Oversight and Investigations, House Comm. on Interstate and Foreign Commerce, 94th Cong., 2d Sess., Alleged Political Pressure to Obtain Export Licenses for Crude Oil (Mar. 1976)).

transactions which were "exports" under other regulatory schemes were not "acts done in the course of export trade" under the Webb-Pomerene Act. 393 U.S. at 211, 89 S.Ct. at 368, 21 L.Ed.2d at 353 (White, J., dissenting). The economic effect of the transactions in this case was higher oil prices to American buyers.

CLC, FEO and FEA price rulings follow a consistent policy of examining the substance of a transaction in applying the price regulations to export sales. *See, e.g.*, CLC Ruling 1973-3, 38 Fed. Reg. 17523 (July 2, 1973); CLC Ruling 1974-3, 39 C.F.R. 10152 (Mar. 14, 1974). The Emergency Court of Appeals has considered the regulations of these three agencies as being "carried forward" to the successor agencies. *Mobil Oil Corp.* v. *FEA*, 566 F.2d 87, 90 (Em.App.1977); *Marathon Oil Co.* v. *FEA*, 547 F.2d 1140, 1146 (Em.App.1976), *cert. denied*, 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 378 (1977).

Even assuming that the agencies' interpretive regulations were not entitled to deference, or were confusing or had made expressions contrary to the findings here, this court's findings are consistent with the intent of Congress which is apparent from the purposes of the EPAA and the ESA.

The court accordingly concludes that the four transactions violated the price regulations of 6 C.F.R. Part 150, and 10 C.F.R. Part 212, as then in force. [6]

V. Restitution

In its prayer for relief, the government requests that the court

> [e]nter a judgment requiring Gathering, Services and Chamberlain to pay into an escrow account, for subsequent distribution to NEPCO customers, a sum between $6,000,000 and $9,000,000, plus interest.

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[6] Because of this holding the court will not consider whether the transactions constituted a "means to evade" the provisions of the regulations. *See* 10 C.F.R. § 210.62(c).

Docket No. 68, Prayer for Relief, ¶ B. The government further contends that any undistributed amounts should be paid to the United States Treasury:

> If the money could not be restored to NEPCO's customers, then it should go to either NEPCO, or if NEPCO were for some reason barred from recovery, to the United States Treasury for the benefit of its citizens generally.

Government's Brief in Support of Its Motion for Summary Judgment, filed Sept. 19, 1979, at 31 n.*.

The defendants object that there is no allegation that NEPCO customers were overcharged, that the government has failed to establish who, or whether any of the customers was injured, and that any such customers are indirect purchasers barred from recovery under *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), *rev'g* 536 F.2d 1163 (7th Cir. 1976), *aff'g* 67 F.R.D. 461 (N.D.Ill.1975). The government replies that a claim for restitution by its nature avoids the complexities inherent in actions for damages by indirect purchasers, and that *Illinois Brick* therefore does not apply.

The amended counterclaim does not allege specifically that NEPCO customers were overcharged, nor does it allege the disposition of unclaimed amounts as discussed in the government's briefs. The defendants' discovery and argument indicate, however, that they clearly understood that these contentions had been raised. The court will therefore treat the allegations as properly raised. *Fed.R.Civ.P.* 15(b).

The defendants urge this court to adopt as controlling in this case *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977).

This court does not think *Illinois Brick* should be applied to bar recovery in this action. Both *Illinois Brick* and *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968), were private actions for damages under § 4 of the Clayton Act. Section 210 of ESA is the private action counterpart to § 4 of the Clayton Act. The clear language of § 210(b) refers to any

person " 'who is found to have overcharged the *plaintiff*.' " *See Florida Power & Light Co.* v. *Belcher Oil Co.*, 82 F.R.D. 78, 27 F.R.Serv.2d 380 (S.D.Fla.1979) (emphasis added). That language is not present in § 209 as it does not foresee private actions or damage claims. Section 209 permits substantively and procedurally different remedies apart from damages. There are significant substantive differences between restitution and damages.[7]

The policies underlying those cases are largely inapplicable to enforcement actions by the government, and restitutionary relief by its nature does not have some of the difficulties which arise in actions for damages.

In an enforcement action, there is no danger that the incentive to enforce the law will be reduced by permitting indirect purchasers to recover. *See Illinois Brick Co.* v. *Illinois*, 431 U.S. at 735, 745-47, 97 S.Ct. at 2069, 2074-75, 52 L.Ed.2d at 718, 724-26. Indeed, if the government were not permitted to represent indirect purchasers, enforcement of the ESA and EPAA would suffer. The efficient enforcement of these acts is best served by leaving actions by the government as free as possible of the constraints placed upon private plaintiffs. *Cf., e.g., General Tel. Co.* v. *EEOC*, 446 U.S. 318, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980) (EEOC need not satisfy Rule 23 requirements).[8]

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[7] "*Restitution*, which lies within that equitable jurisdiction, is consistent with and *differs greatly from the damages and penalties* . . ." (emphasis added). *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 402, 66 S.Ct. 1086, 1091, 90 L.Ed. 1332, 1339 (1945); *accord* D. Dobbs, *Handbook of the Law of Remedies* § 4.1, at 224 (1973). *See also Bowles* v. *Skaggs*, 151 F.2d 817, 821 (6th Cir. 1945), and compare *SEC* v. *Texas Gulf Sulphur Co.*, 446 F.2d. 1301, 1307 (2d Cir. 1971).

[8] Congress clearly intended in ESA enforcement actions not to circumscribe DOE enforcement actions. *See* part II. *supra*. Although individual damage actions under § 210 are limited to direct purchasers, *see Florida Power & Light Co.* v. *Belcher*, 82 F.R.D. 78, 79-80, 27 F.R.Serv.2d 380 (S.D.Fla. 1979); *Arnson* v. *G.M.C.*, 377 F.Supp. 209 (N.D.Ohio 1974), no such express limitations appear in § 209, which authorizes enforcement actions.

This action in any event requires an exception to *Illinois Brick*. Courts have found exceptions to the *Illinois Brick* rule where the antitrust laws would go unenforced in the absence of suits by indirect purchasers. Indirect purchasers may sue where the direct purchaser is a division or subsidiary of a violator, *see Royal Printing Co.* v. *Kimberly-Clark Corp.*, 621 F.2d 323 (9th Cir. 1980), and where the violator and the direct purchaser are co-conspirators, *see Fontana Aviation, Inc.* v. *Cessna Aircraft Co.*, 617 F.2d 478 (7th Cir. 1980). *See also In re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979) ("cost-plus" contracts and "functional equivalents").

In this case NEPCO and PETCO, or the government on their behalf, would be barred from a restitutionary recovery. NEPCO and PETCO made affidavits in support of the defendants' export licenses and further supported the defendants in receiving the export licenses. This aiding and abetting the defendants in their violation of the pricing regulations for their mutual benefit should and does bar them from seeking or receiving any of the illegal profits. They are barred from recovery by their "unclean hands," as restitution is within the equitable power of the court. *See, e.g., Porter* v. *Warner Holding Co.*, 328 U.S. 395, 402, 66 S.Ct. 1086, 1091, 90 L.Ed.1332, 1339 (1945); *Atl. Coast Line R.R.* v. *Florida*, 295 U.S. 301, 309, 55 S.Ct. 713, 716, 79 L.Ed. 1451, 1457 (1935); *S.E.C.* v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1307-08 (2d Cir. 1971), *cert. denied*, 404 U.S. 1005, 92 S.Ct. 561, 30 L.Ed.2d 558 (1971). If this court did not permit the government to sue on behalf of the indirect purchasers, the EPAA would go unenforced. Accordingly, the court holds that the action on behalf of indirect purchasers is not barred by *Illinois Brick*.

Illinois Brick raised a second policy to bar actions by indirect purchasers. The court was concerned with the evidentiary burden placed upon courts by attempts to apportion a recovery among different levels in a chain of distribution. *Illinois Brick Co.* v. *Illinois*, 431 U.S. at 737-45, 97 S.Ct. at 2070-74, 52 L.Ed.2d at 719-24; *see Hanover Shoe Co.* v. *United Shoe Mach. Corp.*, 392 U.S. at 491-93, 88 S.Ct. at 2230-31, 20 L.Ed.2d at 1241. An apportionment of injury must be considered in this case to ensure that this court's equitable remedy is fair. NEPCO's customers were mostly utilities, which probably passed on all or part of their portions of the overcharges to

their residential, industrial and commercial customers. Indeed, common knowledge of how electricity is distributed and used makes this probable. The claims of these customers to a share of the recovery could not be ignored.

The principal thrust of restitution has been to force the wrongdoer to "disgorge benefits that it would be unjust for him to keep." D. Dobbs, *Remedies* § 4.1 at 224 (1973); G. Palmer, *Law of Restitution* § 2.6, at 82 (1978); *see Bloomgarden* v. *Coyer*, 479 F.2d 201, 211 (D.C.Cir.1973). Consistent with the equitable nature of the remedy, courts have been flexible in ensuring that the defendant disgorge his illegal gain, and have not always required payment to individual injured parties. Thus, in *Oakland Raiders* v. *Office of Emergency Preparedness*, 380 F.Supp. 187 (N.D.Cal.1974), the court ordered restitution by a prospective reduction of ticket prices to the extent that ticket purchasers were not identifiable. In *United States* v. *Pro Football*, 514 F.2d 1396, 1402 (Em.App.1975), the court ordered restitution only to those who presented ticket stubs, because of the defendant's good faith. A line of cases from the District of Columbia Circuit provides that, where the return of overcharges to persons who paid is not feasible, the transit company would be required to establish a fund to benefit transit users. *Bebchick* v. *Publ. Util. Comm'n*, 318 F.2d 187, 203 (D.C. Cir.1963), *cert. denied*, 373 U.S. 913, 83 S.Ct. 1304, 10 L.Ed.2d 414 (1963); *see Democratic Cent. Comm'n* v. *Wash. Metro. Area Transit Comm'n*, 485 F.2d 786, 826-28 (D.C.Cir. 1973); *Williams* v. *WMATC*, 134 U.S.App. D.C. 342, 415 F.2d 922, 956-57 (D.C.Cir. 1968), *cert. denied sub nom. D.C. Transit System* v. *Williams*, 393 U.S. 1081, 89 S.Ct. 860, 21 L.Ed.2d 773 (1969).

Because of the difficulty of apportioning a recovery, should the tortfeasor defendants be permitted to benefit from their profiteering? Should the complexity of the oil industry, or of the industrial and commercial institutions that transact the vast majority of business activity in the United States in similar situations, profit from the complexity of determining the injury to each of thousands or millions of the public consumers?

This court thinks not. Equity has been the conscience of the courts. Quite frankly, this court cannot envision a formula which could make

a meaningful distribution to the millions of consumers from Florida to Massachusetts who purchased power or goods or services made or supplied from NEPCO's customers. NEPCO made sales to twelve or more utilities and retailers along the Atlantic seaboard from Florida to Massachusetts. Restitution, an equitable remedy available in this case, is sufficiently flexible to prevent such a result. [9]

It is clear these profits have no character as punishment, but consist of only the overcharged revenues that the defendants were never legally entitled to receive. These defendants have violated the statute and have been unjustly enriched at the expense of all the direct and indirect customers of NEPCO and PETCO. They should not be permitted to keep these gains. *Restatement of Restitution* § 3 (1937). It would be unconscionable to find the defendants in violation of the statute and yet hold that since the task of determining to whom the refunds should go is so formidable that the defendants be permitted to keep their ill-gotten gains. Congress intended such profits to be disgorged by authorizing "restitution." To limit restitution to refunds to those to whom "damage" can be proved would destroy the purpose of the price control regulations and the authorized action by the government under § 209 to seek restitution.

This court concludes that in order to deprive the defendants of their illegal gain, restitution should be made to the United States Treasury. Because of the difficulties involved, no attempt will be made to apportion the recovery among the various levels of distribution injured by the defendants' violations. Realistically this holding very simply means that, since the people are sovereign, and where large numbers, here millions, have been injured, the peoples' institution, the United States government, will recover the disgorged wrongful profits. [10]

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[9] *See In re Hotel Tel. Charges*, 500 F.2d 86 (9th Cir. 1974), an antitrust case, class treatment was not permissible. A meaningful recovery was precluded since each claim was too small to warrant private action.

[10] *See Hodgson* v. *Wheaton Glass Co.*, 446 F.2d 527 (3d Cir. 1971); *Hansen* v. *United States*, 340 F.2d 142 (8th Cir. 1965), restitution cases which point the way where recovery has been placed on deposit with the United States Treasury, not subject to the wrongdoer's claims.

The government has demonstrated injury to a class of persons. As the District of Columbia Circuit has noted,

> The law of class recovery is in flux. The courts are ready to apply bases of recovery with reasonable liberality in order to serve the objectives of the law.

Bangor & Aroostock R.R. v. *Bhd. of Locomotive Firemen & Enginemen*, 442 F.2d 812, 821 (D.C.Cir.1971). To deny recovery in this case would result in an irremediable violation. The doctrine of restitution, however, is sufficiently flexible to avoid this result.

Such a disposition of the recovery does not constitute an "unauthorized penalty." In *Huntington* v. *Attrill*, 146 U.S. 657, 668-69, 13 S.Ct. 224, 228, 36 L.Ed. 1123, 1128 (1892), the Court noted:

> The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or wrong to the individual, according to the familiar classification of Blackstone: "Wrongs are divisible into two sorts of species: *private wrongs* and *public wrongs*. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed *civil injuries;* the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of *crimes* and *misdemeanors*."

The essence of a penalty is punishment for an offense committed against the state. *Id.* at 666-69, 13 S.Ct. at 226-28, 36 L.Ed. at 1127-28. Three factors have been distilled from *Huntington* and later cases to distinguish penal and remedial forms of relief:

> "(1) whether the purpose of the statute was to redress individual wrongs or more general wrongs to the public; (2) whether the recovery under the statute runs to the harmed individual or to the public; and (3) whether the recovery authorized by the statute is wholly disproportionate to the harm suffered."

In re Wood, No. 79-1504, slip op. at 8758 (5th Cir. Aug. 22, 1980) (quoting *Murphy* v. *Household Finance Corp.*, 560 F.2d 206, 209 (6th Cir. 1977)).

As to the first factor this court finds that like most modern consumer remedies § 209 has a dual purpose. On the one hand it is aimed

at remedying harm to the individual who could not practically protect himself from violations by allowing the government to enforce the law for the individual's benefit. On the other hand, § 209 seeks to deter prohibited business practices for the good of the general public. Even so, its purpose is not primarily punishment for an infraction of a public law. *See Porter* v. *Household Finance Corp.*, 385 F.Supp. 336, 342-43 (S.D.Ohio 1974). The first factor therefore indicates that restitution as ordered herein is not penal.

The third factor likewise indicates that the restitution ordered herein is not penal. The amount of restitution is equal to the amount of the illegally obtained profits, and is not at all disproportionate to the harm suffered.

The second factor, taken in the abstract, weighs in favor of characterizing this relief as penal. That the relief flows to the government does not of itself, however, compel the conclusion that it is penal in nature. The Fifth Circuit has noted the necessity to re-evaluate *Huntington* in light of modern business practices and the complexity of the economy. In *In re Wood*, the court stated:

> Candidly acknowledging that TILA [Truth in Lending Act] liability under section 130 "does not fall neatly within the common law categories of either a penalty or a remedial action for injury to property or monetary interest," *id.* at 342, the court concluded that the primary purpose of section 130, *a type of social welfare legislation unknown at the time of Huntington, is remedial*. . . ." (Emphasis added).

In re Wood, No. 79-1504, slip op. at 8758 (citing *Porter* v. *Household Finance Corp.*, 385 F.Supp. 336 (S.D.Ohio 1974)). The relief flows to the government in this case because it cannot flow to the wronged individuals and because permitting the retention of the illegal overcharges would utterly frustrate the purposes of the EPAA. It is clearly "authorized" under § 209 of the ESA; an analysis of the factors of *In re Wood* demonstrates that it is not a penalty.

VI. Penalty

The assessment of a penalty in this action requires a finding that the defendants "willfully" violated the FEA pricing regulations. Economic Stabilization Act, § 208, 12 U.S.C. § 1904 note. The court

has found that the defendants sought the advice of counsel before proceeding with their transactions. The defendants made a good faith effort to comply with the regulations, and clearly and fully explained their transaction to the Department of Commerce.

It is clear that any violation proceeded from the inexperience of the agencies in administering the new regulations, and the unusual time constraints under which they were placed. The regulations contained no examples which might have alerted the defendants that they came within the terms of one regulation, but not of the other.

Accordingly, no penalties will be assessed.

VII. Amount of Recovery

The court is unable to determine from the evidence the amount of restitution to be made. The parties will accordingly be permitted the opportunity to enter a stipulation, failing which, to file appropriate motions.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION
No. 77-101-P

CITRONELLE-MOBILE GATHERING, INC., *et al.*,

Plaintiffs,

v.

JOHN F. O'LEARY etc., *et al.*,

Defendants.

ORDER ON MOTIONS FOR RECONSIDERATION

This cause came to be heard upon the motions of the plaintiffs and the government for reconsideration of this courts's order of September 15, 1980.

The government contends that "willfulness" is not required for the assessment of a civil penalty under § 208)b) of the Economic Stabilization Act. This is correct. *Accord, United States* v. *Futura, Inc.*, 339 F. Supp. 162, 166 (N.D. Fla 1972). Compare § 208(a) (criminal fine) *with* § 208(b) (civil penalty), 12 U.S.C. § 1904 note. Willfulness is nevertheless an appropriate element to consider in exercising discretion to assess or not assess a civil penalty, as it bears upon the violater's state of mind.

The plaintiffs ask the court to clarify whether its order of September 15 is a final order for purposes of appeal. An order granting partial summary judgment as to liability only is not final. *Ralli-Coney, inc.* v. *Gates*, 528 F. 2d 572, 574 n. 3 (5th Cir. 1976); *Borges* v. *Art Steel Co.*, 243 F. 2d. 350 (2d Cir. 1957). *Fed R. Civ. P.* 56(c) provides:

> A summary judgment, *interlocutory in character*, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(Emphasis added); *cf. Fed. R. Civ. P.* 54(b) (multiple claims and parties). *Compare Fed. R. Civ. P.* 58 *with Fed. R. Civ. P.* 54(a). The court's order was not final.

The plaintiffs have indicated their intention to seek an interlocutory appeal of this court's orders on the cross-motions for summary judgment and the motion for recusal. Such a motion would be well taken, with the provisos that, (1) the court will not certify the motion to recuse without the certification of the motion to reconsider, and (2) written motion should be filed on or before Feburary 10, 1981. This is to keep the case moving. It should not be allowed to languish.

The court has considered the other grounds raised by the plaintiffs in their motion to reconsider, amend and alter the order granting partial summary judgment. These contentions have been considered in the drafting of this order.

It is therefore ORDERED that the court's order of September 15, 1980, is CLARIFIED as stated above, and further that the plaintiffs' motion to amend and alter the order is DENIED.

Done at Mobile, Alabama, this the 9th day of January, 1981.

/s/ _____
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION
No. 77-101-P

CITRONELLE-MOBILE GATHERING, INC., *et al.*,
Plaintiffs,

v.

JOHN F. O'LEARY, *et al.*,
Defendants.

OPINION AND ORDER

Citronelle-Mobile Gathering, Inc., Citmoco Services, Inc., and Bart B. Chamberlain, Jr. (plaintiffs) filed a complaint against John F. O'Leary, Administrator of the Federal Energy Administration, Donald E. Allen, Regional Administrator, Region IV, Federal Energy Administration, and Juanita M. Kreps, Secretary of the Department of Commerce. The plaintiffs sought declaratory relief against the Administrator and the Region IV Administrator of the Federal Energy Administration (FEA) and the Secretary of Commerce to declare and establish the rights and other legal relationships arising out of and in connection with the sale by plaintiffs of crude oil to a refinery in the Bahamas during the period between December 1973 and May 1974, and injunctive relief to prevent further alleged investigative harassment of plaintiffs by the FEA with respect to those transactions.

The United States of America filed a motion to join the United States as a party defendant counterclaimant. This motion was granted.

The United States on behalf of the Administrator of the FEA petitioned the court to grant enforcement of certain outstanding

subpoenas that had been issued by the FEA. (See pages 13, 14, and 15 of O'Leary's answer.)

This court issued its standard pretrial order, directing each party to complete discovery on or before June 14, 1977.

Plainftiffs scheduled certain depositions and propounded certain interrogatories to the defendants pursuant to the pretrial order.

On March 22, 1977, the United States, on behalf of all defendants, filed a motion for a protective order requesting, *inter alia*, that the subpoenas duces tecum and depositions set not be enforced and that the interrogatories propounded not be answered pending a hearing on the Government's counterclaim seeking subpoena enforcement.

On April 5, 1977, after a conference between the parties, the court issued an order granting the Government's motion to stay certain scheduled depositions. Another conference was rescheduled for April 12, 1977.

On April 12, all further discovery by plaintiffs was stayed pending further orders of the court.

On April 19, 1977, the plaintiffs filed their answer to the Government's counterclaim setting forth various affirmative defenses, to wit, failure to state a claim for relief generally and failure to state a claim due to Government's failure to specify the regulations which are the basis of the FEA regulations and that the plaintiffs have been subjected to investigation for the sole purpose of harassing and intimidating plaintiffs. It was further alleged that there could be no violation of any price or allocation regulations during the so called "hiatus" period due to the fact that there were no valid regulations during this period. It was claimed that since the export licenses were validly issued they cannot now be collaterally attacked and, finally, that the investigation should not go forward in that the FEA had access to all the documents that they had requested.

On April 26, 1977, plaintiffs filed an amended complaint which contained allegations similar to those in the original complaint.

On May 19, 1977, plaintiffs' motion to permit discovery was denied, but a requested protective order was granted.

On May 30, 1977, a hearing was held by the court. The plaintiffs presented evidence concerning the alleged harassment by the FEA. The defendants presented evidence concerning the enforcement of the regulatory subpoenas.

At the conclusion of the presentation of evidence, the court directed the defendants to go forth with the investigation. The defendants were conditionally limited to a six months investigatory period. They were ordered to report back to the court at the end of that time. The hearing on plaintiffs' claims was recessed.

FINDINGS OF FACT

Citronelle-Mobile Gathering, Inc. is a corporation organized and existing under the laws of the State of Delaware and its principal place of business is in Mobile, Alabama.

Citmoco Services, Inc. is a corporation organized and existing under the laws of the State of Delaware and has its principal place of business in Mobile, Alabama.

Bart B. Chamberlain, Jr. is an officer, director, and the principal and majority stockholder of the plaintiff companies. He is a citizen and resident of Alabama.

The plaintiff companies are commonly controlled and were at all times pertinent hereto engaged in the business of purchasing crude oil (mainly produced in the Citronelle Oil Field in Mobile County, Alabama), transporting and reselling the crude oil at Mobile, Alabama.

John F. O'Leary is the Administrator of the Federal Energy Administration (FEA).

Donald E. Allen is Region IV Administrator of the FEA.

Juanita Kreps is Secretary of Commerce of the United States.

The United States, defendant counterclaimant, has been joined in to effect a subpoena enforcement proceeding against the plaintiffs.

James W. Grimes and John Palmer are Federal Energy Investigators of the Compliance and Enforcement Division of the FEA,

as authorized by the Administrator of the FEA to perform those statutory duties referred to in § 206 of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. 1904 note, incorporated by section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, as amended, 15 U.S.C. § 754.

The FEA's inquiries for which it seeks information can be divided up into two distinct areas. The first area is the export transactions investigations. The second investigation concerns certain transactions which center around the so-called "hiatus period" from September 1-29th of 1975.

THE EXPORT TRANSACTIONS

On four separate occasions during the latter part of 1973 and the first part of 1974, the plaintiffs applied for and were granted export licenses by the Office of Export Administration of the Department of Commerce to export approximately one million barrels of oil to the Bahamas. It was understood between the parties that a like amount of refined product would be re-imported into the United States.

Between January 1974 and the end of May 1974, plaintiffs shipped approximately 989,000 barrels of crude oil from Mobile, Alabama, to Freeport, Bahamas. A like amount was re-imported from the Bahamas into the United States.

In March 1974, the Internal Revenue Service, as the then investigatory arm of the FEA, was directed to investigate the exports of plaintiffs.

In mid-1974, the FEA was given permission by the Department of Commerce to examine export license applications and shippers export declarations then on file at the Department of Commerce concerning plaintiffs' transactions.

In late April of 1975, Trevor Hawk, Region IV Auditor, was in the process of auditing the Citronelle Unit, the producer which supplies the plaintiffs in Mobile County.

On May 5, 1975, James W. Grimes, Region IV Special Investigations Branch Chief, was asked to begin an inquiry into certain of the plaintiffs' crude oil transactions and it was at this time that

Grimes discovered that Hawk was already in the process of initial stages of an investigation in that he was auditing the transactions of plaintiffs.

On June 22, 1975, newspaper articles were published in which allegations of improper use of political influence to obtain export licenses for plaintiffs through the auspices of a Senator and a Congressman (later a Governor). It was alleged that the Senator and Representative had intervened on behalf of a brother of the Congressman for the export licenses which were necessary to consummate an oil transaction between the brother and Chamberlain.

The Governor (ex-Congressman) requested the Attorney General of the United States to investigate the allegations of political influence in issuance of the export licenses. The United States Attorney, thereafter, directed that these allegations be looked into by a grand jury sitting in the Southern District of New York.

On or about June 23, 1975, the Subcommitte on Oversight and Investigations of the Committee on Interstate and Foreign Commerce of the United States House of Representatives, chaired by Representative John E. Moss (the "Moss Subcommittee") initiated an investigation into the allegations of political influence in the issuance of the export licenses.

Plaintiffs were subpoenaed by both the grand jury and the Moss Subcommittee to produce, and did produce, all the requested documents in their possession pertinent to the transactions under investigation. Chamberlain testified before the grand jury. The information provided to the grand jury and subsequently provided to the Moss Subcommittee, and additional pertinent materials, included copies of export license applications and accompanying information, export licenses, information concerning the underlying transactions between Chamberlain and the brother. Other data and correspondence relating to the exports and to the acquisition of crude oil and its later distribution were also supplied.

An understanding was reached between the FEA and the Justice Department in July of 1975 that the FEA would continue its audit of plaintiffs in order to ascertain if there had been any breach of FEA's

price and allocation regulations. The United States Attorney's office in New York had the sole responsibility for any further inquiry into the political influence allegations. FEA made Carl Corrallo available to the U.S. Attorney's Office in order to assist in interpretation of FEA regulations.

During the course of the grand jury investigation Mr. Corrallo was in contact with members of the U.S. Attorney's Office a limited number of times. The FEA continued its auditing of the plaintiffs. Mr. Hawk was permitted full access to any document but was denied the opportunity to copy every document of his choosing. Agent Grimes also conducted a simultaneous investigation covering the export transactions. At no time was FEA able to interview Chamberlain under oath.

In March of 1976, the grand jury investigation terminated with no indictments being returned.

Also in March of 1976, the Moss Subcommittee issued a report in which it found no evidence supporting the allegations of political influence and no evidence that the then effective regulations had been breached. Both the FEA and the Department of Commerce were severely criticized for the investigatory procedures, or more correctly, the lack thereof, in investigating the undue influence allegations. The report chastized FEA for failing to properly implement Congressional policy and for improper actions taken by FEA employees.

Shortly after the Moss report was issued the FEA renewed its investigation into plaintiffs' transactions.

On April 23, 1976, Mr. Grimes met with Chamberlain in order to set up an interview. At this meeting Chamberlain requested a written list of the proposed areas to be discussed. James Easterday, Director of Compliance for Region IV, supplied Mr. Chamberlain with such a list on May 5, 1976, and inquired into the possibility of conducting the interview on May 25, 1976. Later Chamberlain related that he would be out of the country on May 25 and he would set it up sometime between June 9 and June 18. This was not done. After becoming frustrated in its efforts to reach Mr. Chamberlain, the FEA was informed he was indefinitely out of the country.

A meeting was set up between Grimes and Chamberlain's attorney. At this meeting plaintiffs' position was relayed to the FEA. In essence, plaintiffs felt they had given all pertinent information to both the grand jury and the subcommittee and the FEA had access to that information, therefore, they felt that the FEA was harassing them. Further, plaintiffs claimed the FEA had no authority to investigate export transactions.

On Octobr 1, 1976, Chamberlain was served with an FEA subpoena which sought testimony and the production of documents in order to determine if the plaintiffs had been in compliance with FEA's pricing and allocation regulations, 10 C.F.R. parts 210, 211 and 212, as these regulations related to the 1974 export transactions. This subpoena was returnable on October 19, 1976. On October 8, 1976, Chamberlain applied to quash that subpoena, such application was denied, but the return date was put back to October 27, 1976. On October 22, the FEA was requested to reconsider its prior refusal to quash and in response, the October 1, 1976 subpoena was rescinded.

On November 10, 1976, a second similar subpoena was received by Chamberlain returnable in Mobile on December 8, 1976. On November 11 an application to quash this subpoena was made and denied by the FEA on November 30. On December 6, 1976, a request to reconsider was denied by the FEA. A requested extension of the return date was denied. On December 8, 1976, Chamberlain failed to appear and he failed to produce the requested documents as required by the November 10 subpoena.

The "Hiatus Period" Transactions

In October 1975, plaintiff Citmoco Gathering instituted a suit in this court (Civil Action No. 75-483) for damages arising out of Gulf Oil's alleged breach of contract for the sale and delivery of crude oil during the period between the August 31, 1975, expiration of the price and allocation regulations promulgated under the Emergency Petroleum Allocation Act of 1973 and the extension of those regulations by Public Law No. 94-97 on September 29, 1975, the so-called "hiatus period."

On August 20, 1976, this court entered its judgment against plaintiff Citmoco Gathering, Inc. in Civil Action No. 75-483; 420 F.

Supp. 162. This case has been appealed to the Fifth Circuit Court of Appeals. The FEA is defendant-intervenor/appellee in the appeal. A stay of judgment was issued by this court until the question of the constitutionality of the retroactive application of the FEA regulations during the "hiatus period" is determined at the Fifth Circuit level.

On January 6, 1976, the FEA served a *subpoena duces tecum* upon plaintiffs for production of documents with respect to crude oil transactions during the June-September 1975 period. Plaintiffs agreed to present all pertinent documents requested *except* those concerning the "hiatus period." The January 6 subpoena was rescinded on January 22, 1976. A similar subpoena was issued, and, further, the FEA sought leave to intervene in Civil Action No. 75-483. Leave to intervene was granted by the court. The January 22, 1976 subpoena was served on plaintiffs and a motion to quash was filed on February 3, 1976. The motion was denied and the plaintiffs were given until March 22, 1976, to respond to the subpoena.

On March 22 and 23, the plaintiffs complied with the subpoena except as to those requested documents concerning the "hiatus period." The plaintiffs have therefore failed to comply with the FEA's subpoena.

It is clear that plaintiffs have failed to comply with the two FEA subpoenas,[1] which are necessary for the investigation into the export transactions and the "hiatus period" transactions.

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[1] See Defendants' Exhibits 1 through 4.

CONCLUSIONS OF LAW

This action arises under the laws of the Unitd States and this court has jurisdiction based on 28 U.S.C. § 1331.

The Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 751, *et seq*. (EPAA) was enacted by Congress and approved by the President. The Federal Energy Office (later changed to the FEA by Executive Order 11790) assumed responsibility for the pricing and allocation of crude oil and refined petroleum products. Pertinent price and allocation regulations were promulgated by the FEA and published at 10 C.F.R. Parts 209-212 (January 15, 1974).

The Administrator of the FEA is authorized to issue subpoenas in order to carry out the authorized functions of the FEA. He can compel attendance and testimony of witnesses and the production of documents pursuant to Section 206 of the Stabilization Act, incorporated by Section 5(a)(1) of the Allocation Act.

The two subpoenas were issued pursuant to the authority vested in the Administrator of the FEA by Congress and are for the purposes of carrying out a lawful investigation into the transactions of plaintiffs. *Oklahoma Press Publishing Company* v. *Walling*, 327 U.S. 186, 209 (1945). The testimony and documents sought are relevant to the authorized inquiry. *Id*. at 210.

Plaintiffs seek a declaration by this court that, *inter alia*, the subject export licenses (Nos. C-31226-701-1, B-40102-266-1, C-40226-703-1 and C-40416-708-8-1) are valid and were validly issued by the Office of Export Administration of the Department of Commerce and that since the sales were export transactions, they did not come within the scope of FEA's price and allocation regulations.

By its very terms, 28 U.S.C. § 2201, declaratory judgments are discretionary with the court. This court is of the opinion, and so rules, that it would be improper for this court to make any declaration that would in any way impede the FEA's present investigation.

It is therefore ORDERED, ADJUDGED, and DECREED that the two subpoenas have been issued for lawful purposes and were ordered issued on, to wit, August 1, 1977.

It is further ORDERED, ADJUDGED and DECREED that the plaintiffs' request for a declaratory judgment is due to be, and hereby is, DENIED.

The hearing on plaintiffs' original complaint is hereby adjourned and is to be rescheduled in six months from this date unless otherwise ordered by this court.

Done, this the 13th day of September, 1977.

/s/ _____
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CIVIL ACTION
No. 77-101-P

CITRONELLE-MOBILE GATHERING, INC., *et al.*,

Plaintiffs,

v.

JOHN F. O'LEARY *et al.*,

Defendants.

ORDER ON MOTION FOR RECUSAL AND MOTION TO STRIKE

This cause came to be heard upon the motion of the plaintiffs for recusal, pursuant to 28 U.S.C. § 455(a), and their motion to strike the affidavit of William A. Kimbrough.

The plaintiffs contend that recusal is required by virtue of certian statements allegedly made by this judge, or in the alternative, as a result of this judge's relationship with two members of the cast of characters in this action, together with certain statements by William A. Kimbrough, United States Attorney for the Southern District of Alabama and counsel of record herein. The motion is supported with two affidavits by plaintiff Bart B. Chamberlain, Jr., of October 23 and 28, 1980, and one affidavit by Pierre Pelham. The plaintiffs' counsel have filed a certificate of good faith. *See* Docket No. 209.

Twenty-eight U.S.C. § 455(a) provides that:

> Any . . . judge . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

As amended by Act of Dec. 5, 1974, Pub. L. No. 93-512, § 1, 88 Stat. 1609, and Act of Nov. 6, 1978, Pub. L. No. 95-598, tit. II, § 214(a), 92 Stat. 2661.

Where "the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality," recusal should follow. *Potashnick* v. *Port City Const. Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980). This objective test is "designed to promote public confidence in the impartiality of the judicial process," by fostering the appearance as well as the fact of fairness. *H. R. Rep. No.* 1453, 92d Cong., 1st Sess., reprinted in [1974] *U.S. Code Cong. & Ad. News* 6351, 6355.

The 1974 amendments to § 455 had two primary effects: they substituted the "reasonable man" test for the judge's subjective opinion, and eliminated the "duty to sit" in a close question on disqualification. *Id.* at 6354-55; *see Davis* v. *Board of School Comm'rs*, 517 F.2d 1044, 1052 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). Many of the other elements of the prior test for recusal remain under § 455(a). *See In re Corrugated Container Antitrust Litig.*, 614 F.2d 958, 965 (5th Cir. 1980). Thus, in determining the question of impartiality, the court should examine whether bias or prejudice might appear to the reasonable man. *Id.; accord, United States* v. *Conforte*, 624 F.2d 869, 880-81 (9th Cir. 1980), *cert. filed*, 49 U.S.L.W. 3190 (Sept. 12, 1980); *see Davis* v. *Board of School Comm'rs*, 517 F.2d at 1052.

For recusal under § 144, a party is required to file an affidavit which states with particularity material facts which establish extrajudicial bias directed at a party, on the part of the judge. *United States* v. *Serrano*, 607 F.2d 1145, 1150 (5th Cir. 1979). It is clear that the reasonable man would require no less than material facts going to bias or prejudice, stated with particularity, to establish the appearance of impartiality. The tests under §§ 144 and 455(a) are substantially the same. *Compare In re Corrugated Container Antitrust Litig.*, 614 F.2d at 964-65 *with Parrish* v. *Board of Comm'rs*, 524 F.2d 98, 100 (5th Cir. 1975) (en banc), *cert. denied*, 425 U.S. 944 (1976). Thus if the affidavits in this case should satisfy the § 144 legal sufficiency test, they should satisfy the § 455(a) test also. Conversely, if the affidavits should fall short, the court should further inquire what weight the reasonable man would give them, considering the shortcoming.

The reasonable man must accept as true the allegations contained in the affidavits. *Berger* v. *United States*, 255 U.S. 22, 36, 65 L.Ed. 481, 486-87 (1921); *In re Corrugated Container Antitrust Litig.*, 614 F.2d at 967. The material allegations of the first affidavit are as follows:

> On the evening of September 25, 1980, I called my good friends Pierre and Eva Pelham, to invite them to my home for a visit. They indicated that they had a guest but would call back. A short while later, the Pelhams called and indicated that they would like to come to my home for a visit if they could bring their friend and guest, William A. Kimbrough. I responded that they were all welcome and they came to my home for a social visit. . . .
>
> At about 8:00 o'clock that evening, while present in my home and directing his remarks to me, and in the presence and hearing of Mr. and Mrs. Pelham, Mr. Kimbrough stated to me substantially as follows:
>
> "Your problem with this case is the Judge because Judge Pittman says that you did things which caused his friend John Sparkman (former United States Senator John Sparkman), to be publicly embarrassed, and he also says that you have corrupted Lew Odom (Lewis G. Odom, Jr.)."
>
> I was taken aback. The discussion of referenced litigation was not the purpose of his visit, and until that point in time during his visit that litigation had not been mentioned. I personally never intended to and did not raise that subject with Mr. Kimbrough on that evening. . . .
>
> To [Chamberlain's protestations that there was no cause for embarrassment] Mr. Kimbrough replied, "I know all about that and it will make no difference because Judge Pittman believes that you caused his friend, John Sparkman, to suffer all that adverse publicity and as long as he believes it you have a problem." . . . Thereafter the conversation drifted to other and purely social matters.

Affidavit of Bart B. Chamberlain, Jr. (Oct. 23, 1980), Docket No. 209, Exh. A at 1-2.

In his second affidavit, Mr. Chamberlain states:

> On October 24, 1980, copies of my affidavit and the affidavit of Pierre Pelham dated October 23, 1980, were delivered to

> William A. Kimbrough in order to inform him of our intention to seek recusal of Judge Pittman in this matter. Mr. Kimbrough called me on Friday morning, October 24, 1980, after he had received copies of those affidavits and stated to me that the comments attributed to him in the affidavits were made by him and were correctly related in the affidavits. However, on the occasion of this latest conversation with Mr. Kimbrough he stated that his earlier statements regarding Judge Pittman were his surmise rather than actual statements made by Judge Pittman to him; but on the night of September 25, Mr. Kimbrough's statements were in form and substance as if direct attributions to Judge Pittman. Additionally, on the evening of September 25, Mr. Kimbrough also said, as if a direct attribution to Judge Pittman, "You will not have Lew Odom to help you this time," a statement which could not conceivably have been based on newspaper articles, or on surmise or conjecture.

Affidavit of Bart B. Chamberlain, Jr. (Oct. 28, 1980), Docket No. 209, Exh. B at 4. [1]

The plaintiffs proceed upon two lines of argument. First, they contend that the allegations that this court made certain statements are sufficient to require recusal. Second, they contend that Mr. Kimbrough's opinion, together with the other circumstances noted below, is sufficient. [2]

---

[1] Mr. Pelham averred that the "statements attributed by Mr. Chamberlain in his affidavit to William A. Kimbrough were made in my presence and hearing and in the presence and hearing of my wife, and are correctly quoted in referenced affidavit." Affidavit of Pierre Pelham (Oct. 23, 1980), Docket No. 209, Exh. C.

In his affidavits Mr. Chamberlain has expressed his opinion concerning this court's ability to be impartial. Docket No. 209. Exh. A at 3 ¶ 3, Exh. B at 4 ¶ 2 11.16-17 (quoted in text) & ¶ 3. This is only a contention or argument of a litigant.

[2] The court considers this first ground despite the plaintiffs' apparent concession that Mr. Kimbrough's attributions are

> "inherently incredible hearsay. . . . When confronted with an affidavit containing hearsay, the Judge must accept unquestioningly as true only the fact that the hearsay statements, in this case Mr. Kimbrough's statements to Mr. Chamberlain, were actually made. The hearsay

Taking the Chamberlain affidavits separately, it could be argued that there is uncertainty as to whether Mr. Kimbrough attributed statements directly to this judge. Taking "all the circumstances" and contents of the two Chamberlain affidavits together, however, it is clear that Mr. Kimbrough was expressing his own surmise. Second, there is no representation by Mr. Kimbrough or Mr. Chamberlain that this judge made the alleged statements to Mr. Kimbrough. Finally, the time, place and circumstances of the alleged statements by this judge are not set out. All of these factors would serve, at least, to reduce the weight to which the affidavits would be entitled from the reasonable man.

In *Berger* v. *United States*, 255 U.S. 22, 35, 65 L.Ed. 481, 486, the court noted in dicta that " 'rumors or gossip' " do not satisfy the requirements of what is now § 144. The *Berger* court noted that "[i]n the present case the information was of a definite incident, and its time and place were given." *Id.*, 65 L.Ed. at 486. [3]

In the absence of facts stated with particularity, *see United States* v. *Serrano*, 607 F.2d 1145, 1150 (5th Cir. 1979), other circuits have held that affidavits are legally insufficient under § 144. *United States* v. *Haldeman*, 181 U.S. App. D.C. 254, 559 F.2d 31, 131, 134-35 (1976), *cert. denied sub nom. Ehrlichman* v. *United States*, 431 U.S. 933 (1977); *Hodgson* v. *Liquor Salesmen's Local 2*, 444 F.2d 1344, 1349 (2d Cir. 1971); *see United States* v. *Thompson*, 483 F.2d 527, 528 (3d Cir. 1973) (time & place given), *cert. denied*, 415 U.S. 911

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statements themselves need be given only the weight that would be given by a reasonable man who knew nothing of the underlying facts."

Motion to Strike, Docket No. 215, at 4. The weight to be given to the hearsay statements is determined by "all the circumstances" known to the reasonable man. *Potashnick* v. *Port City Const. Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980).

[3] That the affidavits contain hearsay does not make them *per se* insufficient. *Berger* v. *United States*, 255 U.S. at 35, 65 L.Ed. at 486; *In re Corrugated Container Antitrust Litig.*, 614 F.2d at 966-67 & n. 19. *But see United States* v. *Meinster*, 488 F. Supp. 1342, 1345 (S.D.Fla. 1980) (triple hearsay insufficient under § 455.

(1974), *cited with approval, United States* v. *Serrano*, 607 F.2d at 1150.

The plaintiffs contend that the reasonable man would be convinced that this judge had made the alleged statements, notwithstanding the absence of particulars in Mr. Kimbrough's attribution. The reasonable man gives no credence to unsupported speculation or vague attributions such as those by Mr. Kimbrough. This argument is not well taken.

The second line of argument rests upon the central allegations of the Chamberlain affidavits, that:

> (1) this judge has a close relationship with former Senator John Sparkman and his former assistant, Lewis G. Odom, Jr.;
>
> (2) Mr. Odom was involved in the issuance of the export licenses that are at issue in this litigation;
>
> (3) Senator Sparkman received unfavorable publicity linking him to the issuance of the licenses; and
>
> (4) Mr. Kimbrough stated that this judge was biased against the plaintiffs as a result of the above facts.

See Docket No. 209 at 3-4. The first three allegations are set out in detail in the affidavits, and will not be repeated here.[4]

At oral argument to the court the plaintiffs' attorney stated that the motion did not depend on this judge's relationship to parties involved in the transactions and publicity concerning them in the second line of argument; he argued that when considered with Mr. Kimbrough's party statements, sufficient grounds for recusal exist.

The plaintiffs distill two factors from these four allegations which they contend give reasonable support to an inference of partiality:

---

[4] It may be noted that the facts underlying allegations (2) and (3) are also contained in the evidence submitted at the hearing on the plaintiffs' claims, and in support of the cross-motions for summary judgment on the counterclaim. Transcript of Hearing (May 30-31, 1977) at 211, 265-70, 282, Plaintiffs' Exhs. 9 & 10; Chamberlain Testimony (FEA Nov. 15, 1977) at 75, 77-78, 178-82, 193-99; Costikyan Depos., Exh. 2; Docket No. 88, Document #3.

first, that Mr. Kimbrough gave a "plausible explanation" for his opinion, and second, that Mr. Kimbrough is counsel of record in this action, and has a good reputation in the community for truth and veracity.

The reasonable man simply does not credit surmises or plausibilities, no matter who their source may be. The Fifth Circuit has noted that friendships or personal relations which do not "exceed what might be expected as background or associational activities with respect to the usual district judge" do not show lack of imparitiality. *Parrish* v. *Board of Comm'rs*, 524 F.2d at 104 (§ 455(a)). The relationships in *Parrish*, further, were with witnesses and attorneys of record in the action. Senator Sparkman's part in these events was to seek a clarification of a roadblock concerning the issuance of the fourth license; Mr. Odom is not counsel to Mr. Chamberlain in this action, nor has he been called at a witness in person or by deposition.

Courts have consistently held that adverse publicity which a judge receives as a result of his participation in a case does not raise an inference of bias. *E.g.*, *United States* v. *Olander*, 584 F.2d 876, 882 (9th Cir. 1978) (§ 455(a)), *vacated on other grounds sub nom. Harrington* v. *United States*, 443 U.S. 914 (1979); *see In re Union Leader Corp.*, 292 F.2d 381, 389 (1st Cir. 1961) (§ 144), *cert. denied*, 368 U.S. 927 (1961); *cf. United States* v. *Wolfson*, 558 F.2d 59, 62 (2d Cir. 1977) (§ 455(a): telegram from defendant does not establish bias). *But cf. Spires* v. *Hearst Corp.*, 420 F. Supp. 304 (C.D. Cal. 1976) (favorable publicity by defendant's newspaper after suit was filed). The same is true for publicity directed at other persons. Further, the affidavits establish that Senator Sparkman was cleared of any improprieties by the Moss Subcommittee report; this fact would reduce the force, if any, of unfair publicity for the inquiry on impartiality. *See* Docket No. 209, Exh. A at 2 ¶ 1.

Mr. Kimbrough's position as counsel of record in this action is a circumstance which would make it less likely that he would make the alleged statements if they were not true. Although his reputation in the community may add credibility to his opinions; this adds nothing to the analysis, as the reasonable man forms his opinions from the facts presented, and not from the opinions of others. *Cf. Hodgson* v. *Liquor Salesmen's Local 2*, 444 F.2d at 1349 (§ 144). Given both his

position and reputation, one may not deduce that the reasonable man regards alike every utterance of persons of stature. As noted above, the circumstances upon which Mr. Kimbrough's opinion is based, according to the Chamberlain affidavits, are not themselves sufficient to support a reasonable inference of partiality. The circumstances of Mr. Kimbrough's statements must also be considered; loose party talk, especially that which is conclusory and general, may be discounted.[5]

The plaintiffs' second line of argument appears to be an attempt to heap innuendo upon questionable inferences; taken together, these factors fail to rise to a reasonable inference of bias. This argument is not well taken.

It is therefore ORDERED, ADJUDGED, and DECREED that the motion to recuse should be, and is hereby, DENIED.

Prior to the hearing on the motion to recuse, the Government filed an affidavit by the attorney of record for the Government who is referred to in the plaintiffs' affidavits, William A. Kimbrough, in response to the plaintiffs' motion to recuse, a copy of which is attached as "Appendix A." The plaintiffs have filed a motion to strike this counter-affidavit. Since the court has denied to motion to recuse without consideration of the Government's counter-affidavit, the motion to strike is moot.

Done, this the 6th day of January, 1981, at Mobile, Alabama.

/s/ _____
UNITED STATES DISTRICT JUDGE

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[5] The plaintiffs noted at oral argument that Mr. Kimbrough reiterated his opinion of bias in the sanctity of his office on October 24, 1980. The relevant portion of the second Chamberlain affidavit, quoted in text at n. 2 above, is more accurately characterized as correcting the affiant's report of Kimbrough's party statements.

"APPENDIX A"

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION
No. 77-101-P

CITRONELLE-MOBILE GATHERING, INC., *et al.*,

Plaintiff,

v.

JOHN F. O'LEARY *et al.*,

Defendants.

AFFIDAVIT

William A. Kimbrough, being first duly sworn, hereby deposes and says:

1. I am the United States Attorney for the Southern District of Alabama. In that capacity, I appear as an attorney of record in virtually every case to which the United States, or an agency or officer of the United States, is a party in this district, including the instant case. Although I am generally acquainted with the subject matter of the instant case, the primary responsibility for handling the case has from the outset been assigned to attorneys from the Civil Division, Department of Justice, Washington, D.C.

2. On the night of September 25, 1980, I felt genuinely sorry for Chamberlain, and compulsively offerred an excuse that did not place the blame for his predicament on his own shoulders: I stated in substance that his problem may be with the judge, who may feel that Lew Odom misled Judge Pittman's good friend John Sparkman in connection with the export-license transaction giving rise to the case. I did not state, imply, or give cause to infer, that Judge Pittman had stated any of this to me or indeed that I had had any conversations whatsoever with Judge Pittman concerning the case. My observation

was a spur-of-the-moment thought, not based on any prior reflection, and certainly not based on any factual evidence that Judge Pittman acted with bias at any time in this case.

3. On September 26, 1980, Mr. Chamberlain called and expressed some uncertainty whether the order entered September 15 was final and expressed concern that nothing further be done until "Leon" [Jaworski] could "get on the case." Mr. Chamberlain specifically requested that I call Judge Pittman to relay Chamberlain's request that no further action be taken until the October 31 motion docket. I did so, and Judge Pittman informed me that no action would be taken before then. I may have phoned Chamberlain with that information, or I may merely have told him during his call to me I would relay the request.

4. Upon receipt of the affidavits, I called Chamberlain and told him that the affidavits did not correctly relate my remarks as I had not stated or implied that I had any conversations with Judge Pittman. I told him that I had never had any conversations with Judge Pittman concerning the case, and that filing the affidavits would be unfair to Judge Pittman, to myself, and to Chamberlain himself. He replied that the matter was in the hands of his lawyers, that he had been abused for two years, and had had enough.

5. Except for the conversation related in paragraph 3, I have never spoken with Judge Pittman about this case except in open court or in chambers in the presence of counsel for all parties. Indeed, since I became United States Attorney, Judge Pittman has taken pains to keep a distance between myself and himself.

6. I have no reason to believe that Judge Pittman has acted improperly in this action or is biased against Mr. Chamberlain. To the extent that the statements attributed to me in Mr. Chamberlain's affidavits imply otherwise, the statements were totally baseless and unfair to Judge Pittman, and not based on any conversation I have had with Judge Pittman or any statement he has made in my presence.

/s/ _____
WILLIAM A. KIMBROUGH

Subscribed and sworn to before me this 17th day of November, 1980.

/s/ _____
LINDA R. NELSON
Notary Public, State of Ala. at Large

My commission expires:

11-10-84

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION
No. 77-101-P

CITRONELLE-MOBILE GATHERING, INC., *et al.*,

Plaintiffs,

v.

JOHN P. O'LEARY *et al.*,

Defendants.

ORDER AMENDING ORDER ON MOTION FOR RECUSAL AND MOTION TO STRIKE

The court's order on the plaintiffs' motion for recusal and motion to strike of January 6, 1981, is hereby amended by deleting therefrom the paragraph on page 9 beginning "[p]rior to the hearing . . ."

The order is hereby further amended by adding, after the first textual paragraph on page 9, the following ground for decision.

Prior to the hearing on the motion for recusal, the Government filed an affidavit by the attorney of record for the Government who is referred to in the plaintiffs' affidavits, William A. Kimbrough, in response to the plaintiffs' motion to recuse. The plaintiffs moved to strike the affidavit. This motion was fully briefed and argued by the parties.

The Fifth Circuit held subsequently to argument on the motions that under § 455(a) the allegations of the moving party need not be accepted as true. *Phillips* v. *Joint Legislative Comm.*, Nos. 79-2131, 79-2940 & 79-3550, slip op. at 3960, 3966-67 & n.6 (5th Cir. Unit A Feb. 23, 1981). This result was adumbrated by the different modes of analysis employed by the Fifth Circuit under §§ 144 and 455(a): that is, "sufficiency of the affidavits" and "all the circumstances,"

respectively. *In re Corrugated Container Antitrust Litig.*, 614 F. 2d 958; *Parrish* v. *Board of Comm'rs* 524 F.2d 98; *Davis* v. *Board of School Comm'rs*, 517 F. 2d 1044. *Compare Potashnick* v. *Port City Const. Co.*, 609 F. 2d 1101 *with United States* v. *Serrano*, 607 F.2d 1145. The legislative history of § 455 points out that

> [t]he issue of disqualification is a sensitive question as assessing *all the facts and circumstances* in order to determine whether the failure to disqualify was an abuse of judicial discretion.

H.R. Rep. No. 1453, 92d Cong., 1st Sess., *reprinted in* [1974] *U.S. Code Cong. & Ad. News* at 6355.

There is no specific procedure for a motion pursant to § 455. *Phillips* v. *Joint Legislative Comm.*, slip op. at 3966; *Roberts* v. *Bailer*, 625 F.2d 125, 128 n.8 (6th Cir. 1980); *United Stated* v. *Sibla*, 624 F.2d 864, 867-68 (9th Cir. 1980). If the court is to consider all the circumstances, the plaintiffs may not, by filing an affidavit, circumscribe inquiry as to those circumstances, particularly where the matter sought to be stricken is an affidavit by Mr. Chamberlain's source of information, Mr. Kimbrough, which clarifies his initial statement to Mr. Chamberlain and his relationship to this judge. The motion to strike is therefore due to be, and is hereby, denied. [1]

The Kimbrough affidavit states, in pertinent part:

> 2. . . . I did not state, [or] imply, . . . that Judge Pittman had stated any of this to me or indeed that I had had any conversations whatsoever with Judge Pittman concerning the case.
>
> . . . .
>
> 4. Upon receipt of the affidavits, I called Chamberlain and told him that the affidavits did not correctly relate my remarks as

---

[1] The court does not consider whether procedural devices other than an opposing affidavit may be available when a motion is filed pursuant to § 455.

Certain portions of the affidavit contain Mr. Kimbrough's opinions or irrelevant matter. These have not been considered. *See* Docket No. 220 at 4, note 1; Docket No. 213, Attachment, § 1, § 2 11. 1-7, § 2 11. 4-6, § 6.

I had not stated or implied that I had any conversations with Judge Pittman. I told him that I had never had any conversations with Judge Pittman concerning the case. . . . He replied that the matter was in the hands of his lawyers, that he had been abused for two years, and had had enough.

5. Except for [relaying a message at the request of Mr. Chamberlain], I have never spoken with Judge Pittman about this case except in open court or in chambers in the presence of counsel for all parities.

Docket No. 213, Attachment. These facts confirm, rather than refute, the allegations of the second Chamberlain affidavit, that Mr. Kimbrough's statements resulted from his surmise, and not from statements made by this judge. The Kimbrough affidavit establishes unequivocally what is clear from the face of the Chamberlain affidavits, that a reasonable man would not consider that this judge's impartiality might reasonably be questioned.

It is so ORDERED at Mobile, Alabama, this the 23rd day of March, 1981.

/s/ _____

UNITED STATES DISTRICT JUDGE

APPENDIX G

Temporary Emergency Court of Appeals of the United States

No. 5-60
5-61

CITRONELLE-MOBILE GATHERING, INC., *et al.*,
Plaintiffs-Appellants,

v.

JAMES B. EDWARDS, SECRETARY OF ENERGY, *et al.*,
Defendants-Appellees.

Before SPEARS, HEMPHILL And POINTER, Judges.

ORDER

Upon consideration of the petitions for rehearing and suggestions for rehearing *en banc* filed on behalf of Appellants, Amicus Curiae Texaco, Inc., et al. and Amicus Curiae American Petroleum Institute,

IT IS HEREBY ORDERED that the petitions for rehearing are DENIED.

IT IS FURTHER ORDERED that the suggestions for rehearing *en banc* are DENIED.

FOR THE COURT:

Donna M. Bold
Clerk

/s/ STEPHEN M. MANCUSO
Deputy Clerk

March 26, 1982

Opposition

Office - Supreme Court, U.S.
FILED
JUN 28 1982
ALEXANDER L. STEVAS,

No. 81-1563

In the Supreme Court of the United States

OCTOBER TERM, 1981

CITRO-ELLE-MOBILE GATHERING, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether actions for restitution brought by the United States under Section 209 of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note, to enforce the mandatory petroleum price regulations promulgated pursuant to the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.*, are subject to state statutes of limitations.

2. Whether sales of domestic crude oil by American corporations to a wholly-owned foreign refining subsidiary of another American corporation, made with the intent that the products refined from the oil would be shipped to the parent corporation in the United States, qualified as "export sales" exempt from otherwise applicable petroleum pricing regulations.

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Miscellaneous:

Chevron U.S.A., Inc., DOE Interpretation 1980-10, 45 Fed. Reg. 42248 (1980) 18, 19

Cost of Living Council Phase III Ruling 1973-3, 38 Fed. Reg. 17523 (1973) 14, 15

Cost of Living Council Phase IV Ruling 1974-3, 39 Fed. Reg. 10152 (1974) 14

DOE Interpretation 1978-10, 43 Fed. Reg. 15621 (1978) 15

DOE Interpretation 1980-41, 45 Fed. Reg. 76048 (1980) 15

Exec. Order No. 12,287, 46 Fed. Reg. 9909 (1981) 4

FEA Interpretation 1976-22, 42 Fed. Reg. 7942 (1977) 14

FEA Interpretation 1977-16, 42 Fed. Reg. 31151 (1977) 14-15

Guam Oil & Refining Co., FEA Interpretation 1976-22, 42 Fed. Reg. 7942 (1977) 18

17 Op. Att'y Gen. 579 (1983) 8

Rookwood Oil Terminals, Inc., FEA Interpretation 1976-8, 42 Fed. Reg. 7932, 7933 (1977) 16

S. Rep. No. 92-507, 92d Cong., 1st Sess. (1971) 9

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1963

CITRONELLE-MOBILE GATHERING, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 669 F. 2d 717. The opinion of the district court (Pet. App. 21a-49a) is reported at 499 F. Supp. 871.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1982, and a petition for rehearing was denied on March 26, 1982 (Pet. App. 79a). The petition for a writ of certiorari was filed on April 23, 1982. The jurisdiction of this Court is invoked under Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note, and 28 U.S.C. 1254(1).

STATUTE AND REGULATION INVOLVED

Section 209 of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note, provides:

> Whenever it appears to any person authorized by the President to exercise authority under this title that any individual or organization has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any order or regulation under this title, such person may request the Attorney General to bring an action in the appropriate district court of the United States to enjoin such acts or practices, and upon a proper showing a temporary restraining order or a preliminary or permanent injunction shall be granted without bond. Any such court may also issue mandatory injunctions commanding any person to comply with any such order or regulation. In addition to such injunctive relief, the court may also order restitution of moneys received in violation of any such order or regulation.

10 C.F.R. 212.53(a) (1975), 39 Fed. Reg. 1924, 1952 (1974), provided:

> The prices charged for export sales of covered products, including sales to a domestic purchaser which certifies the product is for export, are exempt.[1]

STATEMENT

This case concerns four transfers of domestic crude oil from petitioners Citronelle-Mobile Gathering, Inc. ("Gathering"), and Citmoco Services, Inc. ("Citmoco"), to the Grand Bahamas Petroleum Company, Ltd. ("Petco"). The transfers, which occurred between December 1973 and May 1974, were made pursuant to an agreement entered into by petitioner Bart B. Chamberlain, Jr., and Edward M. Carey, Sr. (Pet. App. 21a).

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[1]This provision was a repromulgation of 6 C.F.R. 150.54(d)(1) (1974), 38 Fed. Reg. 21592, 21602 (1973). It was issued when the responsibility for administering price controls on petroleum was transferred from the Cost of Living Council to the Federal Energy Office.

Petitioner Chamberlain is the principal officer of both Gathering and Citmoco (collectively herein the "Chamberlain companies"), and the principal stockholder of each, owning 95% of the stock of Gathering and 87.5% of the stock of Citmoco (C.A. App. 60, 527, 534).[2] Gathering and Citmoco are domestic corporations engaged in the purchase, transportation, and sale of crude oil produced from the Citronelle Field located in Alabama (C.A. App. 526). Petco, a Bahamian corporation, was a wholly-owned subsidiary of the New England Petroleum Corporation ("Nepco"), a New York corporation, which was in turn a wholly-owned subsidiary of Carey Energy Corporation, also a domestic corporation (Pet. App. 25a-26a). Edward M. Carey, Sr., was the president and sole stockholder of Carey Energy, as well as the president of Nepco and a director of Petco (*id.* at 26a).

In December 1973—during the Arab oil embargo and three weeks after Congress enacted the Emergency Petroleum Allocation Act, 15 U.S.C. 751 *et seq.*—Chamberlain and Carey agreed that the Chamberlain companies would sell Petco quantities of domestic crude oil at $14.00 per barrel, that the crude oil would be refined in the Bahamas by a Nepco/Petco affiliate, and that the refined product would then be shipped to Nepco in the United States for resale to Nepco's domestic customers (C.A. App. 345, 449-450, 498). The agreement was embodied in four separate contracts. Pursuant to those contracts, the Chamberlain companies sold Petco nearly 1,000,000 barrels of domestic crude oil at prices of $14.00 and $13.00 per barrel (Pet. App. 21a, 27a)—nearly three times the maximum lawful selling

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[2] "C.A. App." refers to the joint appendix filed in the court of appeals.

price mandated by domestic price controls in effect at that time.[3]

In order to obtain export licenses necessary to ship crude oil outside the United States, petitioners were required to satisfy a Commerce Department export licensing regulation requiring that such shipments not "diminish the total quantity or quality of petroleum available to the United States * * *." 15 C.F.R. 377.6(b)(3) (1974), 38 Fed. Reg. 34442 (1973).[4] To meet this requirement, affidavits were supplied by officers of the Chamberlain companies and by Carey and other officers of the Carey corporations stating that all of the products refined from the crude oil would be purchased by Nepco and brought back to the United States (see, *e.g.*, C.A. App. 497, 501, 507).

The Commerce Department routinely granted licenses for the first three shipments (C.A. App. 347, 411-412, 558). However, when petitioners' fourth license application was under consideration by the Commerce Department's Petroleum Products Exceptions Committee (C.A. App. 412), the Federal Energy Office ("FEO") recommended denial on grounds not relevant here (C.A. App. 413, 575). The FEO subsequently agreed, however, that the license could be granted if the Commerce Department concluded, as it ultimately did, that petitioners had met the requirements of

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[3]Price controls on petroleum were terminated on January 28, 1981. Exec. Order No. 12,287, 46 Fed. Reg. 9909 (1981).

The district court has not yet determined the maximum lawful selling price of the oil at issue in this case. However, petitioner Chamberlain has estimated the lawful maximum selling price as $5.10 per barrel (C.A. App. 354).

[4]Petitioners incorrectly include petroleum products within the scope of this restriction on crude oil exports. Compare Pet. 3 with 38 Fed. Reg. 34442 (1973). Thus petitioners err in asserting (Pet. 3) that the "export sales" exemption to the petroleum pricing regulations could have applied only to transactions that did not diminish the quantity of petroleum available to the United States.

that Department's licensing regulations (Pet. App. 29a-30a; C.A. App. 413, 566, 574-578). In granting the license, the Commerce Department took the position that the lawfulness of the prices petitioners charged for the oil was a matter for a separate FEO investigation and was not relevant to the licensing decision (C.A. App. 413, 575).

In accordance with the representations made to the Commerce Department by officers of the Chamberlain companies and the Carey corporations, the domestic crude oil was shipped to Petco in the Bahamas, and the products refined from the oil were then shipped to and sold in the United States by Nepco.

2. After the issuance of the fourth license in April 1974, the FEO and the Internal Revenue Service (which at that time served as the FEO's investigative arm) began an investigation to determine whether petitioners' sales violated the petroleum pricing regulations. In June 1975, several newspaper reports alleged that improper political influence had been used to obtain the export licenses (Pet. App. 57a-58a, 68a). A congressional subcommittee and a federal grand jury in the Southern District of New York investigated those charges and found them to be without merit (C.A. App. 411, 427, 874; Pet. App. 57a-58a).

In April 1976, after those investigations had ended, the FEO's successor, the Federal Energy Administration ("FEA"), sought to arrange a voluntary meeting with petitioner Chamberlain for the purpose of continuing the civil investigation concerning possible violations of the petroleum pricing regulations (C.A. App. 114-121). An agreement could not be reached, however, and in November 1976 the FEA issued an administrative subpoena to Chamberlain (C.A. App. 123). Petitioners then filed a civil action in the United States District Court for the District of Columbia for injunctive and declaratory relief against the investigation (C.A. App. 18-32). Following a hearing in February

1977 (C.A. App. 34-56), petitioners voluntarily dismissed their suit, but three days later they initiated the present action in the United States District Court for the Southern District of Alabama, seeking virtually identical relief (C.A. App. 2, 59-77). The United States intervened and filed a counterclaim for enforcement of the subpoena (Pet. App. 53a). In September 1977, after discovery and trial, the district court enforced the subpoena (Pet. App. 53a-62a), and in November of that year the FEA obtained Chamberlain's testimony. In November 1978, after further investigation, the United States filed a second counterclaim, alleging that petitioners' sales had violated petroleum pricing regulations issued to enforce the Emergency Petroleum Allocation Act of 1973 ("EPAA"), 15 U.S.C. 751 *et seq.* The United States sought restitution of the overcharges pursuant to Section 209 of the Economic Stabilization Act of 1970 ("ESA"), 12 U.S.C. 1904 note (Pet. App. 2a).[5]

3. The district court granted partial summary judgment in favor of the United States on its counterclaim for restitution (Pet. App. 21a-49a).[6] The court rejected petitioners' argument that the claim was barred by Alabama's one-year statute of limitations (Ala. Code tit. 6, § 6-2-39(a)(5) (1977)), reasoning that EPAA's purpose—preventing economic dislocations—was clearly national in scope and that the application of diverse state statutes of limitations would " 'frustrate or interfere with the implementation of national policies' " (Pet. App. 34a, quoting *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 367 (1977)). The court also held that the defense of laches was not established

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[5]Section 209 of the ESA is incorporated by reference in Section 5(a)(1) of the EPAA, 15 U.S.C. 754(a)(1). The United States contends that the total amount of overcharges, exclusive of interest, is $8,142,900, a figure petitioners will apparently contest.

[6]The district court denied the United States' request for the imposition of civil penalties (Pet. App. 48a-49a).

because petitioners had not been prejudiced by the delay in initiating suit (Pet. App. 37a-41a). The court stated that the "export sales" exemption should be interpreted in light of the "economic reality" of the transactions (*id.* at 40a-41a, quoting *United States* v. *Concentrated Phosphate Export Association*, 393 U.S. 199, 208 (1968)). In this instance, the court observed, the economic reality was that the transactions caused "higher oil prices to American buyers" (Pet. App. 41a). The court noted that a line of consistent interpretations by the agencies that issued and enforced the petroleum price regulations indicated that the exemption applied only to those sales in which the higher prices fell upon foreigners rather than Americans (*id.* at 39a, 41a). The court found that interpretation to be consistent with the statute's manifest purpose (*id.* at 41a).

The court also held that the Carey companies were not entitled to restitution because of "unclean hands" (Pet. App. 44a) and that distribution of the recovery to Nepco's customers would be infeasible (*id.* at 44a-46a). Since the court considered it inequitable to allow petitioners to retain the overcharges (*id.* at 45a), it held that "where large numbers, here millions, have been injured, the peoples'[*sic*] institution, the United States government, will recover the disgorged wrongful profits" (*id.* at 46a). The court reserved for later determination the calculation of the amount of restitution (*id.* at 49a).

4. On interlocutory appeal, the Temporary Emergency Court of Appeals modified the remedial aspects of the order but affirmed it in all other respects.

The court of appeals unanimously agreed that the Alabama statute of limitations did not govern, reasoning that application of diverse state statutes of limitations would frustrate the policies of the ESA and EPAA (Pet. App. 6a-7a, 12a). The court also relied (*id.* at 7a) on *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946), which held that suits to

enforce equitable rights created by federal law are not subject to state statutes of limitations.[7]

The court affirmed on the "export sales" issue as well. Relying on an opinion of the Attorney General (17 Op. Att'y Gen. 579, 583 (1883)) that concerned analogous facts and was quoted with approval in *Swan & Finch Co.* v. *United States*, 190 U.S. 143, 145 (1903), the court of appeals held that there had been no exportation of crude oil because there had been no intent permanently to unite the oil to the mass of goods belonging to the Bahamas (Pet. App. 3a-4a). The court also concurred with the district court that the transactions could not be considered "export sales" since the economic reality of the transactions was to impose higher prices on American consumers, contrary to the purpose of both the EPAA and the petroleum price regulations (*id.* at 3a-6a).[8]

On the issue of restitution, the court of appeals agreed with the district court that the Carey corporations were barred from recovery by unclean hands (Pet. App. 9a) and that there was "no justification for allowing [petitioners] to retain their illegal gains" (*id.* at 8a). However, the court modified the portion of the lower court order providing that the recovery be paid to the United States (*id.* at 9a). The court held that "the Government has a *duty* to try to ascertain those overcharged, and refund them * * * with interest * * * from the restitution funds" (Pet. App. 10a; emphasis in original).

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[7]Petitioners did not challenge the district court's adverse finding on the issue of laches (see Pet. App. 12a).

[8]Judge Pointer dissented. He agreed that imposition of price controls on the transactions might be appropriate as a matter of policy but argued that consistency with other elements of the regulatory scheme and with the intervening opinions of several government officials nevertheless required recognition of an exemption (Pet. App. 12a-16a).

ARGUMENT

The portions of the decision of the court of appeals challenged by petitioners are correct and do not conflict with any decisions of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. As the court of appeals recognized (Pet. App. 7a), actions to enforce equitable rights created by federal law are not subject to state statutes of limitations. *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946). Relying upon *Bacon* v. *Howard*, 61 U.S. (20 How.) 22 (1858), petitioners attempt to distinguish *Holmberg* by noting that any restitutionary recovery obtained by the United States may ultimately be paid to persons who could have brought actions at law for damages under Section 210 of the ESA, 12 U.S.C. 1904 note (Pet. 10-13).[9] *Bacon*, however, is inapposite. *Bacon* held only that where an action was assigned from a party with a remedy at law to a party whose remedy was in equity, the statute of limitations applicable to the original party remained in force (61 U.S. (20 How.) at 26). In this case, the position of the United States is not comparable to that of an assignee. The purpose of this action is not to revive lapsed private claims but "to vindicate the public interest, to compel compliance with the Act and to prevent and undo inflationary tendencies" (*Porter* v. *Warner Holding Co.*, 328 U.S. 395, 402 (1946)). Any compensation ultimately received by private parties is "simply a by-product" of that enforcement effort (*Bulzan* v. *Atlantic Richfield Co.*, 620 F. 2d 278, 282 (TECA 1980)). In analogous circumstances, in *Porter* v. *Warner Holding Co.*, *supra*, this Court recognized the right of the United States to maintain an action for

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[9]Petitioners also mistakenly rely (Pet. 12) upon the rule that statutes of limitations apply to suits in equity where there is a parallel legal remedy. The Section 210 damage remedy is not available to the United States. S. Rep. No. 92-507, 92d Cong., 1st Sess. 9 (1971). Thus, the United States has no parallel legal remedy to compel disgorgement of overcharges.

restitution even though the dissent argued (328 U.S. at 406-408), as petitioners contend here, that restitution should not be permitted because the private remedies of the persons who would receive restitution were already time-barred.

Moreover, as the "TECA, a court intimately familiar with the intricacies of federal energy regulation" (*Tully* v. *Mobil Oil Corp.*, No. 81-96 (Feb. 22, 1982), slip op. 2) recognized (Pet. App. 7a), application of diverse state statutes of limitations would "frustrate or interfere with the implementation of national policies" (*Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 367 (1967)).[10] Since one of the principal objectives of the EPAA was to achieve the "equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and * * * among all users" (15 U.S.C. 753(b)(1)(F)), the variations in local limitations law would have a particularly severe and deleterious effect upon the attainment of the EPAA's national objectives. Furthermore, given the "exceedingly complicated" nature of the undertakings assigned to FEO and its successor agencies (*Condor Operating Co.* v. *Sawhill*, 514 F. 2d 351, 359 (Temp. Emer. Ct. App.), cert. denied, 421 U.S. 976 (1975)) and the limited resources at their disposal,

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[10]The court of appeals did not believe that its holding was compelled by the decision in *Occidental Life Insurance Co.* v. *EEOC*, *supra*, as the brief *amicus curiae* maintains (Br. 3-4). See Pet. App. 6a-7a. The court merely relied upon that decision for the general rule that "[s]tate limitations periods will not be borrowed if their application would be inconsistent with the underlying policies of the federal statute" (432 U.S. at 367). The brief *amicus curiae* also incorrectly states (Br. 5) that the court of appeals failed to make "a careful analysis of the relevant statutory scheme or expressions of legislative intent, as this Court did in *Occidental Life*." In fact, the court of appeals expressly relied upon "[t]he primary underlying policy of the ESA" and the "overall effect of borrowing state statutes of limitations in cases such as [this]" (Pet. App. 7a).

it is not likely that Congress expected them to conduct comprehensive inquiries into compliance with the mandatory petroleum price regulations by the thousands of enterprises in the industry within the one-year period imposed by state statutes of limitations like Alabama's.[11] Any one of a number of common occurrences, such as a parallel criminal investigation or resistance to agency subpoenas by those under investigation (both of which occurred here), could make compliance with such statutes virtually impossible

Some of the regulated entities in the petroleum industry are among the world's largest corporations. The audit of a major integrated refiner like Exxon Company, whose yearly income exceeds the gross national product of most countries, can alone take several years. Even when a single transaction is involved, the Department of Energy ("DOE") may not learn of the transaction until several years after its occurrence. By that time, short statutes of limitations like Alabama's will have run. Especially in view of the initial absence of effective government machinery to police the price regulations (*Ashland Oil Co.* v. *Union Oil Co.*, 567 F. 2d 984, 990 n.11 (TECA 1977), cert. denied, 435 U.S. 994 (1978)), it is no more plausible to conclude that Congress intended to consign DOE's enforcement actions "to the vagaries of diverse state limitations statutes, some as short as one year" (*Occidental Life Insurance Co.* v. *United States, supra*, 432 U.S. at 370-371) than it would be to conclude that Congress intended that "[a]udits and investigations might not be allowed to run their normal courses"

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[11] Petitioners contend (Pet. 10-11) that if state statutes of limitations do not apply, the government may bring actions 20 years or more after the events upon which they are based. See also Amicus Br. 10-11. However, the district court held that the defense of laches applies to cases such as this (Pet. App. 35a), and that holding was not disturbed on appeal (see *id.* at 12a). But see *Smith* v. *Woods*, 178 F. 2d 467 (5th Cir. 1949) (laches not defense in action under analogous statute); *Woods* v. *Wayne*, 177 F. 2d 559 (4th Cir. 1949) (same); *Woods* v. *McCord*, 175 F. 2d 919 (9th Cir. 1949) (same).

because of "the vagaries of private litigation" under such statutes (*Dyke* v. *Gulf Oil Corp.*, 601 F. 2d 557, 567 (Temp. Emer. Ct. App. 1979)). See also *R.D. Bowerman*, 1 DOE (CCH) para. 80,261 (1978).

Indeed, there is every reason to infer from Congress' silence on this question that no statute of limitations was meant to apply. In enacting the ESA, Congress was able to draw upon the experience gained from the Emergency Price Control Act of 1942, 50 U.S.C. App. (1946 ed.) 901 *et seq.* ("EPCA"), and similar legislation enacted during World War II and the Korean War. Thus, the " 'common lore' of anti-inflationary controls established by * * * court decisions" under those statutes is part of the "context" of the ESA (*Amalgamated Meat Cutters* v. *Connally*, 337 F. Supp. 737, 748 (D.D.C. 1971)). Although the damages remedy provided by the EPCA was subject to a federal statute of limitations (50 U.S.C. App. (1946 ed.) 925(e)), the courts of appeals consistently held that actions for restitution brought under that statute by the United States were equitable and thus not subject to any statute of limitations. *United States* v. *Owens*, 207 F. 2d 725 (6th Cir. 1953); *United States* v. *Pileggi*, 192 F. 2d 878 (2d Cir. 1951); *Orenstein* v. *United States*, 191 F. 2d 184, 193 (1st Cir. 1951); *Smith* v. *Woods*, 178 F. 2d 467 (5th Cir. 1949); *Woods* v. *Wayne*, 177 F. 2d 559 (4th Cir. 1949); *Woods* v. *McCord*, 175 F. 2d 919 (9th Cir. 1949); *Ebeling* v. *Woods*, 175 F. 2d 242, 244-245 (8th Cir. 1949); *Blood* v. *Fleming*, 161 F. 2d 292 (10th Cir. 1947). Therefore, in enacting the ESA, Congress had every reason to expect that the courts would continue to apply this well-settled rule that statutes of limitations do not apply to actions for restitution brought by the government.[12]

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[12]Petitioners' reliance (Pet. 12, 14) upon *Ashland Oil Co.* v. *Union Oil Co.*, 567 F. 2d 984 (Temp. Emer. Ct. App. 1977), cert. denied, 435 U.S. 994 (1978), is misplaced. The court there held that private rights of

2. Petitioners also contend (Pet. 15-19) that the transactions at issue in this case were "export sales" within the meaning of 10 C.F.R. 212.53(a) and were therefore exempt from the petroleum price controls imposed pursuant to the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.* Since the statute expired on September 30, 1981 (15 U.S.C. 760g), this question of regulatory construction is now of little importance, and further review by this Court is accordingly not warranted. In any event, the courts below correctly held that the "export sales" exemption is inapplicable here.

a. Petitioners maintain (Pet. 15-16) that the plain meaning of the terms "export sales" and "export," which appear in 10 C.F.R. 212.53(a), encompass the transactions involved in this case. In our view, however, it is highly doubtful that such "round-trip" transactions would be termed "exports" or "export sales" in ordinary parlance. See *Swan & Finch Co.* v. *United States, supra*, 190 U.S. at 145.[13] It is therefore necessary to construe those terms with an eye to the statute's purpose. Faced with a similar problem of interpretation in *United States* v. *Concentrated Phosphate Export Association*, 393 U.S. 199 (1968)—*i.e.*, construction of the "export trade" exemption to the antitrust laws contained in the Webb-Pomerene Act, 15 U.S.C. 62—this Court examined

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action under Section 210 of the ESA are subject to state statutes of limitations, but it expressly distinguished governmental enforcement actions (567 F. 2d at 989). This distinction is consistent with the construction given the World War II-era EPCA by the courts of appeals.

[13]The court of appeals relied upon *Swan & Finch Co.* v. *United States, supra* (Pet. App. 4a), because it provides a useful general definition of "exportation," *i.e.*, "a severance of goods from the mass of things belonging to this country with an intention of uniting them to the mass of things belonging to some foreign country" (190 U.S. at 145). Thus, even if it is true, as petitioners claim (Pet. 17), that that case concerned "the temporary storage of a commodity abroad" rather than its sale, that factual distinction does not undermine the court's reasoning.

the purpose of the exemption and concluded that Congress intended to "depriv[e] foreigners of the benefits of competition among American firms, without in any significant way injuring American consumers" (393 U.S. at 208). Since the effect of the transactions in that case—sales to a foreign government financed by American foreign aid—was felt by Americans, the court held that the exemption did not apply even though, as the dissent noted (393 U.S. at 211 & n.3), the transactions clearly were considered "exports" for some purposes.[14]

This case is similar. The Department of Energy and its predecessors, in a consistent series of rulings interpreting their own regulations, explained that "export sales" were exempt because price controls were intended to benefit Americans while permitting the sale of exports at higher prices and thereby improving the American balance of trade. Accordingly, the exemption was found to apply when the sales produced foreign revenues but not when the higher prices would ultimately fall upon Americans. Cost of Living Council (CLC) Phase III Ruling 1973-3, 38 Fed. Reg. 17523 (1973): CLC Phase IV Ruling 1974-3, 39 Fed. Reg. 10152 (1974); FEA Interpretation 1977-16, 42 Fed. Reg. 31151

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[14]Petitioners attempt to distinguish *Concentrated Phosphate* by asserting (Pet. 17) that *Guam Oil & Refining Co.*, FEA Interpretation 1976-22, 42 Fed. Reg. 7942 (1977) "squarely held that federally financed sales of crude oil to a foreign government were exempt 'export sales.' " But whether such sales are exempt is not at issue here. *Concentrated Phosphate* is relevant and the court of appeals relied upon it (Pet. App. 5a) because it illustrates that the term "export sales' " in 10 C.F.R. 212.53(a) must be construed in light of the regulation's purpose. Moreover, federal financing is not even mentioned in *Guam Oil*, and the FEA's subsequent decision in *United States Department of the Interior for the Government of the Mariana Islands*, 6 FEA (CCH) para. 83,026 (1977), had the effect of reversing the result in *Guam Oil*. FEO's predecessor, the Cost of Living Council, had previously held squarely that federally-financed foreign aid sales are not exempt. CLC Phase III Ruling 1973-3, 38 Fed. Reg. 17523 (1973).

(1977); DOE Interpretation 1978-10, 43 Fed. Reg. 15621 (1978); DOE Interpretation 1980-41, 45 Fed. Reg. 76048 (1980). For example, in CLC Phase III Ruling 1973-3, *supra*, 38 Fed. Reg. at 17523, the Council held that products sold to overseas base exchanges were not "export sales" because the exchanges' subsequent sales were "primarily to United States citizens."[15]

In this case, the courts below correctly evaluated petitioners' transactions in light of the regulation's purposes and therefore examined the "economic reality" of the transactions. *United States* v. *Concentrated Phosphate Export Association, supra*, 393 U.S. at 208. The economic reality of those transactions is that the petroleum products refined from oil produced in the United States were consumed in the United States. Americans can hardly consume oil at home while at the same time selling it abroad. Since Americans consumed the oil, they paid for it.[16]

The result would be the same even if petitioners were correct in asserting that the prices exacted by the Chamberlain companies had no effect on the prices that could lawfully have been charged to American consumers by the

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[15]Contrary to the statement in the petition (Pet. 16 n.11) it was these sales *by* the exchanges and not the sale *to* the exchanges that were characterized by the CLC as "not normal commercial export transactions." Petitioners attempt to distinguish these decisions (*ibid.*) by asserting that they all involved either sales to federal instrumentalities or equal volume exchanges. Those facts, however, were not the basis for the agencies' decisions.

[16]The fact that one of the Carey corporations, Petco, was incorporated in the Bahamas is of no more importance to the economic reality of the transactions than the fact that an independent sovereign served as nominal purchaser in *Concentrated Phosphate*. Petco was wholly-owned by Nepco, an American corporation, and Nepco was in turn wholly-owned by Edward Carey. Therefore, the "economic reality" of the transactions would not have been affected by the method the Carey companies chose to distribute any profits or losses among the corporations.

Carey corporations. First, the United States is not required to prove in price control cases that the defendant's direct customers themselves violated the law in sales to their customers (*Batson* v. *Porter*, 154 F. 2d 566 (4th Cir. 1946)), and the domino-like effects of any such requirement would soon render price control litigation unmanageable. Whether it was the Carey companies or their customers who bore the impact of petitioners' prices, while possibly of some relevance in distributing any recovery, is immaterial to the "export sales" issue because, in either event, the effect was felt by Americans. Moreover, whether or not Petco—or even Nepco—was subject to price controls, the courts below were amply justified in concluding that higher prices resulted to Nepco's American customers since prices to indirect purchasers are raised by overcharges to their suppliers. *Mid-West Paper Products Co.* v. *Continental Group, Inc.*, 596 F. 2d 573, 593 (3d Cir. 1979); *In re Beef Industry Antitrust Litigation*, 600 F. 2d 1148, 1167 (5th Cir. 1979), cert. denied, 449 U.S. 905 (1980).

Furthermore, petitioners' argument (Pet. 18) that their prices did not affect the prices that could lawfully be charged to Nepco's customers overlooks the fact that Nepco and its wholly-owned subsidiary, Petco, were a single "firm" for price control purposes (10 C.F.R. 212.31) and the petroleum products Petco sold to Nepco for resale to American consumers were subject to price controls. As a Bahamian corporation, the Petco refinery was not itself required to conform its prices to domestic price regulations applicable to refiners (10 C.F.R. Part 212, Subpart E). However, under the regulations to which Nepco was subject, "the cost of a product for cost pass-through purposes to the firm's customers is the external cost to the 'firm,' and not the cost as reflected in intra-company transfers, or in 'sales' within the 'firm' " (*Rookwood Oil Terminals, Inc.*, FEA Interpretation 1976-8, 42 Fed. Reg. 7932, 7933 (1977)). The sales of

domestic crude oil by the Chamberlain companies to Petco at nearly three times the domestic price constituted an overcharge to the Nepco "firm" and directly increased the costs, and hence the prices, that Nepco could lawfully pass on to its American customers.[17]

b. Petitioners contend (Pet. 16) that their interpretation of the export sales exemption conforms to the "contemporaneous construction by the agency's own lawyers and officials." In fact, however, petitioners have misinterpreted two

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[17]The decision in *New England Petroleum Corp.*, 2 FEA (CCH) para. 83,136 (1975), aff'd, 2 FEA (CCH) para. 80,468 (1975), modified, *New England Petroleum Corp.* v. *FEA*, 455 F. Supp. 1280 (S.D.N.Y. 1978), upon which petitioners (Pet. 17) and the partial dissent below relied (Pet. App. 13a), is not to the contrary. Both the district court and the FEA recognized that, since Nepco's refinery was located overseas, Nepco was not entitled to participate as of right in the crude oil cost-equalization entitlements program intended by Congress to assist American refiners (10 C.F.R. 211.67). However, the opinions also recognized that since Nepco was also a "domestic marketer," it was appropriate to grant considerable exception relief (see 455 F. Supp. at 1288-1290 (summarizing FEA position)) to mitigate the marketing disadvantage that resulted from Petco's exclusion from the Entitlements Program. Thus, while these opinions considered exception relief with respect to the FEA's *allocation* regulations (10 C.F.R. Part 211), they did not address the application of *price controls* to Nepco. 10 C.F.R. Part 212.

of the three sources upon which they rely,[18] and the third is of little, if any, probative value.[19]

Petitioners also maintain (Pet. 16) that their construction is supported by "the agency's own formal rulings and interpretations." However, neither of the rulings they cite addressed either the question posed here or even a closely analogous question.[20]

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[18]Petitioners rely (Pet. 16) upon the following statement in a letter by the FEA administrator to a congressional subcommittee investigating these transactions (C.A. App. 402; emphasis added):

> *[A]ssuming there are no other factors bearing on the issue*, the sale of crude oil by a U.S. producer to a foreign refiner for export pursuant to a validly issued export license is exempt from U.S. price controls and can occur at whatever price the parties agree upon.

The letter did not conclude whether the circumstances involved here constituted such "other factors."

Petitioners also rely (Pet. 16) upon the fact that FEO saw no legal impediment to the issuance of an export license for the fourth transaction (C.A. App. 412-413). As noted (see page 4, *supra*), however, the price charged was viewed as irrelevant to the licensing decision but rather a matter for a separate FEO inquiry (C.A. App. 413, 575).

[19]During subpoena enforcement proceedings, a former Assistant United States Attorney assigned to the criminal investigation testified that an FEA staff attorney told him that petroleum exported under a valid export license was exempt from price controls (C.A. App. 314-315). Such hearsay concerning the views of a staff attorney is of little value. Moreover, the government offered but was not allowed to call the staff attorney to rebut that testimony (C.A. App. 371-374, 389).

[20]In *Guam Oil & Refining Co.*, FEA Interpretation 1976-22, 42 Fed. Reg. 7942 (1977), the agency determined that sales of residual fuel oil to a utility in Saipan were export sales since the Trust Territories are not part of the "United States" as that term is used in the EPAA. The statement upon which petitioners' rely (Pet. 16)—that export sales are those "made into geographic areas outside of the United States" (*id.* at 7943)—was made with reference to that issue.

In *Chevron U.S.A., Inc.*, DOE Interpretation 1980-10, 45 Fed. Reg. 42248 (1980), the agency did not construe the "export sales" exemption

c. Finally, petitioners argue (Pet. 16) that their interpretation is required to harmonize 10 C.F.R. 212.53(a), which exempted "export sales" from price controls, with 10 C.F.R. 211.1(b)(1), which excluded from allocation controls (10 C.F.R. Part 211) all "[e]xports of crude petroleum and petroleum products subject to [the Commerce Department's export licensing regulations]." However, there is a good reason why the term "export sales" in 10 C.F.R. 212.53(a) should have a narrower meaning than the term "exports" in the allocation rule. The allocation rule incorporated the definition of exports in the Commerce Department's export control regulations, and because of their purpose the latter regulations defined "exports" very broadly. For example, if a petroleum product was shipped from a seller in Detroit to a buyer in Buffalo by the most direct route—*i.e.*, through southern Ontario—it constituted an "export" within the meaning of those regulations (15 C.F.R. 377.6(d)(6)(ii)(b)). Unlike the allocation rule, 10 C.F.R. 212.53(a) did not make reference to the Commerce Department's export control regulations and was designed to serve a far different purpose. Thus, it was not anomalous that the term "export sales" had a different meaning than the term "exports" in the Commerce Department regulations or the allocation rule.

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but rather decided whether Balboa in the Canal Zone was a "United States port" within the meaning of 10 C.F.R. 211.67(d)(2). Chevron posited, and DOE assumed, that the sales were export sales (45 Fed. Reg. at 42249).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1982

DOJ-1982-06

Petitioner's Reply Brief

Office-Supreme Court, U.S.
FILED
JUL 30 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1963

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

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Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The Temporary Emergency Court Of Appeals Of The United States

REPLY MEMORANDUM

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

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IN THE

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UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The Temporary Emergency Court Of Appeals Of The United States

REPLY MEMORANDUM

1. The petition presents the question whether a suit for restitution of alleged petroleum overcharges, brought by the United States on behalf of private persons who themselves had an independent statutory right to sue, is subject to some period of limitation. As the public statements of the Department of Energy ("DOE") indicate, disposition of this question is likely to affect hundreds of pending and future cases. *See* Pet. 11 & n.8. For this reason, the government does not contest the importance of the question presented. In opposing certiorari, the government argues only that the decision below is correct. It is not.

The government's central argument is that a suit for restitution brought by the United States as the representative of private persons is not subject to a statute of limitation because

restitution is an equitable remedy. Br. in Opp. 9.[1] In making this argument, the government ignores a series of decisions by this Court, all involving suits in equity, which expressly held that a suit brought by the United States as the representative of third persons is subject to the same limitation that would have governed an action brought by those third persons in their own right. *United States* v. *Beebe*, 127 U.S. 338, 347 (1888); *United States* v. *Des Moines Navigation and Railway Co.*, 142 U.S. 510, 538 (1892); *Curtner* v. *United States*, 149 U.S. 662, 673 (1893). *See also United States* v. *American Bell Telephone Co.*, 167 U.S. 224, 264-65 (1897); *Moran* v. *Horsky*, 178 U.S. 205, 213 (1900); *French Republic* v. *Saratoga Vichy Spring Co.*, 191 U.S. 427, 438 (1903); *United States* v. *New Orleans Pacific Ry. Co.*, 248 U.S. 507, 519 (1919). This line of cases is discussed in the petition, *see* Pet. 10, 12-13, but not in the government's opposition.[2] The government's failure to acknowledge those decisions, however, does not deprive them of legal force.

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[1] The government relies upon *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946), for the general proposition that suits in equity are not subject to statutes of limitation. That case, however, involved only "federal right[s] for which the *sole* remedy is in equity." *Id.* at 395 (emphasis added). Thus, there was no danger in *Holmberg* that equitable jurisdiction had been invoked as a means of circumventing the limitation on a previously available legal remedy. Where, as here, an equitable claim is substituted for an expired legal claim, this Court has been vigilant to prevent circumvention of the statute of limitation. *See, e.g.*, *Cope* v. *Anderson*, 331 U.S. 461, 463-64 (1947).

[2] The one case that the government does discuss is *Bacon* v. *Howard*, 61 U.S. (20 How.) 22 (1858), which it seeks to distinguish on the ground that the plaintiff there was a private person. What the government overlooks is that the rule of *Bacon* was later applied in *Beebe* and subsequent cases in which the United States was the plaintiff. Thus, the government's discussion of *Bacon* affords no basis whatsoever for distinguishing the later cases upon which petitioners rely.

The *Beebe* line of cases survives *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355 (1977), upon which the government relies. *See* Br. in Opp. 10-11. In *Occidental Life*, the government had contended for a broad new rule, the gist of which was that whenever the United States brings suit on behalf of third persons it does so to vindicate the public interest and therefore must be permitted to proceed without regard to the state statutes of limitation that otherwise would govern. *See* Brief *Amicus Curiae* of the American Petroleum Institute ("API Br.") 5. *See also EEOC* v. *Occidental Life Ins. Co.*, 535 F.2d 533, 537 (9th Cir. 1976).[3] This Court, however, declined to endorse that argument. Instead, without disavowing its earlier decisions, the Court reasoned narrowly that to subject actions brought by the Equal Employment Opportunity Commission on behalf of private claimants to state statutes of limitation could "directly conflict with the timetable for administrative action expressly established in the 1972 Act . . . [and] would be inconsistent with the congressional intent underlying the enactment of the 1972 amendments." 432 U.S. at 369 (footnote omitted). This carefully drawn opinion makes clear that the Court was not setting forth a broad new rule, immunizing the United States from state statutes of limitation whenever it sues in a representative capacity. The Court was simply carving out a narrow exception to the *Beebe* line of cases, an exception that comes into play only when specific features of the statutory scheme and its legislative history are in-

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[3] The government's reference to *Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946), appears to be an effort to resurrect this argument about "vindicat[ing] the public interest." Br. in Opp. 9. The concept of vindicating the public interest, however, was relevant in *Warner Holding Co.* only to the question whether the government was authorized to sue for restitution on behalf of third persons under the World War II price control statutes. That question does not arise here, for it is undisputed that the United States has a statutory right to sue for restitution on behalf of third persons under section 209 of the Economic Stabilization Act of 1970 ("ESA"), 12 U.S.C. § 1904 note.

compatible with the periods of limitation prescribed by state law.

This case does not fit within the exception carved out by *Occidental Life*. To the contrary, the statutes authorizing petroleum price controls and their legislative history "contain[ ] no indication that expressed national policy is inconsistent with any fixed period of limitation borrowed from state law." *Ashland Oil Co. of California* v. *Union Oil Co. of California*, 567 F.2d 984, 989 (TECA 1977), *cert. denied*, 435 U.S. 994 (1978). *See also* Pet. 13-14; API Br. 4-5. To be sure, as the government points out, Br. in Opp. 12-13 n.12, *Ashland Oil* was concerned with private actions, not with suits brought by the United States. But the government has not adduced any evidence in the statute itself or the legislative history that Congress intended the result to differ depending upon whether private claimants sued or the United States did so on their behalf.[4]

At bottom, as this Court recognized in *Occidental Life*, the question of the applicability of state statutes of limitation to federal causes of action is one of congressional intent. In the absence of any firm indication of congressional intent in the statute or its legislative history, this Court historically has supplied the presumption that Congress intended to impose some period of limitation. Thus, from *McCluny* v. *Silliman*, 28 U.S. (3 Pet.) 270 (1830), the Court "has repeatedly 'borrowed' the state law of limitations governing an analogous cause of action." *Board of Regents* v. *Tomanio*, 446 U.S. 478, 483-84 (1980).[5] This presumption has been applied so consistently that

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[4] Although the government would have it otherwise, *see* Br. in Opp. 10 n.10, the court of appeals below did not carefully scrutinize the statutory language and legislative history the way this Court did in *Occidental Life*. To the contrary, the court of appeals did not bother even to refer to either the language of the statute or its history. *See* Pet. App. A, pp. 6a-7a.

[5] In arguing that the Court should "infer from Congress' silence on this question that no statute of limitations was meant to apply," Br. in Opp. 12, the government seeks to turn this case law on its head and thereby undo 150 years of settled practice.

it is now understood that Congress legislates with it in mind. *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 703-04 (1966). The government in this case offers no evidence of a contrary congressional intent.[6] Instead, the government urges that considerations of policy should lead this Court to legislate on Congress' behalf. Br. in Opp. 10-12. That, however, is not this Court's role. *Interstate Circuit* v. *Dallas*, 390 U.S. 676, 690 (1968).

The considerations of policy urged by the government have little force in any event. First, the government argues that it would be desirable to have a uniform period of limitation for enforcement of rights under a national program. Br. in Opp. 10. But "variations in local limitations law," *id.*, are merely a natural consequence of our Nation's federal system. To argue, as the government does, that federal rights should not be subject to such variations runs counter to 150 years of this Court's jurisprudence. *See* Pet. 11. Moreover, the issue here is not so much one of uniformity versus nonuniformity as it is one of *some* limitation versus *no* limitation. To argue, as the government does, that there should be no limitation at all flies in the face of the almost universal recognition that "it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979), *quoting Order of Railway Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 349 (1944).

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[6] The government argues, but without any support in the actual legislative history, that Congress when it legislated may have been mindful of a handful of courts of appeals decisions, holding that suits for restitution under the World War II price control statutes were not subject to a one-year federal statute governing actions for damages. Br. in Opp. 12. Those decisons did not address the question of state statutes of limitation. In enacting section 209 of the ESA, Congress could hardly have relied upon cases it did not have before it for a proposition that they did not decide.

Second, the government contends that DOE is unable to audit the activities of large, far-flung enterprises "within the one-year period imposed by state statutes of limitations like Alabama's." Br. in Opp. 11. This truly is a red herring. Corporations are amenable to suit wherever they do business, 28 U.S.C. § 1391(c), and there are at least ten states across the land with applicable limitation periods of five years or longer.[7] DOE therefore has ample time in which to conduct audits of and institute suits against substantial, multi-state businesses of the kind with which the government professes to be concerned.

2. The government's discussion of the scope of the regulatory exemption for "export sales" begins by impugning petitioners' exports of crude oil, and the subsequent importation of petroleum products by third parties, as " 'round-trip' transactions." Br. in Opp. 13. There are two principal points to note about this characterization. First, it emphasizes that the government's reading of the regulation converts the exemption for "export sales" of crude oil into a mere trap for the unwary: crude oil was forbidden to be exported unless a like quantity of crude oil or petroleum products would be returned to the United States, 15 C.F.R. § 377.6(b)(3), 38 Fed. Reg. 34442 (Dec. 13, 1973), yet the government takes the position that such crude oil transactions, the only ones permitted, were not "export sales." Second, the government's characterization represents an effort to fudge the distinction between *crude oil*

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[7] GA. CODE ANN. § 3-704 (1975); ILL. ANN. STAT. ch. 83, § 16 (Smith-Hurd Supp. 1981); KY. REV. STAT. § 413.120(2) (1981); MICH. STAT. ANN. § 27A.5813 (Callaghan 1977); MINN. STAT. ANN. § 541.05(2) (West Supp. 1982); MISS. CODE ANN. § 15-1-49 (1972); MO. ANN. STAT. § 516.120(2) (Vernon 1952); OR. REV. STAT § 12.080(2) (1981); S.D. COMP. LAWS ANN. § 15-2-13(2) (1969); WIS. STAT. ANN. § 893.93(1)(a) (West Supp. 1981).

and *petroleum products*.[8] This distinction had crucial regulatory significance. The regulations governing crude oil were different from those governing petroleum products, and the distinction between the two was sharply delineated and carefully maintained throughout the entire regulatory scheme. *Compare, e.g.*, former 10 C.F.R. Part 212 Subparts D and L (production and sale of crude oil) *with* former 10 C.F.R. Part 212 Subparts E and F (refining and sale of petroleum products). The government has recognized and given effect to this distinction in other closely related contexts as well. For example, at the same time it was litigating this case, the government was vigorously and successfully arguing in *American Maritime Ass'n* v. *Blumenthal*, 590 F.2d 1156 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 943 (1979), that the Jones Act does not forbid an integrated refiner from hiring foreign-flag vessels to transport crude oil from Alaska to its refinery in the Virgin Islands and then to the transport the resulting petroleum products back from the Virgin Islands to the United States, because "crude oil is simply quite different from the ultimate products which come out of a refinery." *Id.* at 1162. Thus, we are left with the anomaly that the government characterizes petitioners' sale of crude oil to an unrelated foreign refiner as a "round-trip transaction" while at the same time treating a domestic refiner's use of an offshore facility as involving two separate one-way trips. The only apparent explanation for this anomaly is that if the government had taken consistent positions in these two cases, it could not have prevailed, as it has thus far, in both.[9]

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[8] This effort also is apparent in the comment that "Americans can hardly consume *oil* at home while at the same time selling it abroad." Br. in Opp. 15 (emphasis added). This case concerns not the consumption of oil but the exportation of crude oil and the later importation and domestic consumption of petroleum products.

[9] The Civil Division of the Department of Justice litigated *American Maritime* between September, 1977, and November, 1978. During the same period, the Civil Division repeatedly sought and obtained extensions of time within which to file the amended counter-

The government endorses the lower courts' reliance upon *United States* v. *Concentrated Phosphate Export Association*, 393 U.S. 199 (1968), asserting that "[t]his case is similar." Br. in Opp. 14. In fact, *Guam Oil & Refining Co.*, Interpretation 1976-22, 42 Fed. Reg. 7942 (Feb. 8, 1977), was not just similar but essentially identical to *Concentrated Phosphate*, and the agency held that the transactions there were "export sales." Moreover, *Guam* established three principles incompatible with the decision below: exports "into geographic areas outside of the United States" are "export sales," *id.* at 7943; in doubtful cases, the agency looks to whether the Department of Commerce treated the transactions as exports "for purpose of export licenses," *id.*; sales need not produce net foreign revenue in order to constitute "export sales."[10]

The government wrongly claims that a "consistent series of rulings [denied the exemption] . . . when the higher prices would ultimately fall upon Americans." Br. in Opp. 14.[11] In both *Guam* and *Chevron U.S.A., Inc.*, Interpretation 1980-10, 45 Fed. Reg. 42248 (June 24, 1980), the agency held that the

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claim in this case. *See* J.A. 4-6. The counterclaim, which articulated for the first time the theory that petitioners' exports of crude oil were not "export sales," finally was filed eight days after the court of appeals had decided *American Maritime* in the government's favor.

[10] The government incorrectly tries to suggest that *Guam* was reversed by *United States Department of the Interior for the Government of the Northern Mariana Islands*, 6 FEA (CCH) ¶ 83,026 (June 28, 1977). *See* Br. in Opp. 14 n.14. In fact, in *Mariana Islands* the agency, recognizing that *Guam* had correctly construed the exemption for "export sales," simply granted a discretionary exception.

[11] None of the rulings upon which the government relies involved a sale to a private purchaser. They all involved sales to federal instrumentalities or equal-volume exchanges—transactions that the agency itself has distinguished. *See* Pet. 16 n.11.

exemption for "export sales" was available in such circumstances.[12]

The government completely misstates the application of the regulations to Petco and Nepco. Once again, this is a consequence of fudging the distinction between crude oil and petroleum products. If Petco had been a reseller, purchasing petroleum products and reselling them to Nepco, then, as the government suggests, Br. in Opp. 16, the maximum lawful price Nepco could have charged might have been determined by reference to Petco's cost. But Petco was a refiner, purchasing crude oil and refining it into petroleum products. The regulatory definition of "firm" was never used to assimilate a firm's foreign refining operations into its domestic refining or reselling activities. *See New England Petroleum Corp.*, 2 FEA (CCH) ¶ 83,136, at 83,429 (May 2, 1975), *aff'd*, 2 FEA (CCH) ¶ 80,648 (Aug. 7, 1975). *See also* 41 Fed. Reg. 7125, 7127 (Feb. 17, 1976) (foreign refining operations of Exxon and Texaco).[13] Consequently, when Nepco purchased petroleum products from Petco, its maximum lawful prices were determined by reference to what it had paid Petco for those products, not what Petco had paid petitioners and others for crude oil. 10 C.F.R. § 212.93. The government is simply wrong when it asserts that petitioners' sales to Petco "directly increased

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[12] The government seeks to distinguish *Chevron* by claiming that DOE merely "assumed . . . that the sales were export sales." Br. in Opp. 18-19 n.20. In fact, recognition of the transactions as "export sales" was a necessary predicate for the agency's ruling.

[13] There was simply no regulatory mechanism for such assimilation. The refiner price formula was extremely complicated, *see* 10 C.F.R. § 212.83, its application required data that foreign refiners were not required to supply, and, as the government correctly concedes, Br. in Opp. 16, it did not in fact apply to foreign refiners. Nor was there any other regulatory provision pursuant to which the manifold costs of refining could be calculated and constructively attributed to the petroleum products that a refiner sold.

the . . . prices, that Nepco could lawfully pass on. . . ." Br. in Opp. 17.[14]

Finally, the government's proffered distinction between the regulatory exemptions for "exports" and "export sales," *see* Br. in Opp. 19, is bogus. The agency had no intention of or reason for granting an exemption from allocation controls to trans-Canadian shipments such as from Detroit to Buffalo, and such shipments in fact were not required to be made pursuant to export licenses. *See* J.A. 419.

For the reasons stated here and in the petition for a writ of certiorari, the petition should be granted.

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[14] By the same token, the record contradicts the government's factual assertion, Br. in Opp. 17, that petitioners' sales increased Nepco's costs. *See* J.A. 805.

Amicus Brief

Office - Supreme Court, U.S.
FILED
MAY 17 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1963

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BRIEF *AMICUS CURIAE* OF THE AMERICAN PETROLEUM INSTITUTE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1963

CITRONELLE-MOBILE GATHERING, INC., *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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BRIEF *AMICUS CURIAE* OF THE AMERICAN PETROLEUM INSTITUTE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The American Petroleum Institute (API) submits this brief *amicus curiae* in support of the petition for a writ of certiorari filed by Citronelle-Mobile Gathering, Inc., *et al.*[1] API supports this Court's review of the first

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[1] Petitioners and respondent have given their written consent to the filing of this brief *amicus curiae*. Copies of those consents have been lodged with the Clerk.

question presented by the petition: Whether the United States, as the representative of third persons who themselves have an independent statutory right to sue, may prosecute an action for restitution under Section 209 of the Economic Stabilization Act of 1970 (ESA), as amended, 12 U.S.C. § 1904 note, unhindered by any statute of limitation.

INTEREST OF THE AMICUS CURIAE

API is a trade association representing approximately 315 member companies and 8,000 individual members. API's members are engaged in all facets of the petroleum industry, including the production, refining, and marketing of crude oil and refined petroleum products.

API's members have a vital interest in the statute of limitations issue presented in this case. The court of appeals held that the government is free to bring enforcement actions under Section 209 of the ESA seeking monetary recoveries on behalf of private parties for alleged violations of the Department of Energy's Mandatory Petroleum Allocation and Price Regulations without regard to any statute of limitations. Until President Reagan issued Executive Order No. 12287, 46 Fed. Reg. 9909 (January 30, 1981), abolishing all remaining allocation and price controls, many of API's members were subject to DOE's allocation and price regulations. Despite the termination of those regulations, the court of appeals' holding exposes API's membership to the unending threat of indeterminate liability as a result of future suits based, without limitation, on transactions that occurred years ago. In what follows, we show that the court of appeals' decision misapplies decisions of this Court and presents a question of substantial importance to the courts, federal agencies, and the public.

ARGUMENT

I. BASED ON A MISAPPLICATION OF DECISIONS OF THIS COURT, THE COURT OF APPEALS ERRONEOUSLY REFUSED TO APPLY THE MOST ANALOGOUS STATE STATUTE OF LIMITATIONS TO GOVERNMENT ENFORCEMENT ACTIONS BROUGHT ON BEHALF OF THIRD PARTIES UNDER SECTION 209 OF THE ESA

The government brought this enforcement action under Section 209 of the ESA, seeking restitutionary relief on behalf of allegedly overcharged third parties. In enacting Section 209, Congress established no specific statute of limitations—"a void which is commonplace in federal statutory law. When such a void occurs, this Court has repeatedly 'borrowed' the state law of limitations governing an analogous cause of action." *Board of Regents* v. *Tomanio*, 446 U.S. 478, 483-84 (1980). The Court has consistently followed that rule for more than 150 years, *UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 703-04 (1966) (citing cases), and, as petitioners explain (Pet. 12), has long applied the rule to the federal government where, as here, it is suing as the representative of third parties. *See, e.g., United States* v. *Beebe*, 127 U.S. 338 (1888); *Curtner* v. *United States*, 149 U.S. 662 (1893).

In withstanding the test of time, the rule rests on the sound presumption that "Congress would not have intended the anomaly of a class of perpetual rights." *Developments in the Law—Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1266 (1950). *See also UAW* v. *Hoosier Cardinal Corp., supra*, 383 U.S. at 704. But the court of appeals here mistakenly inverted that long-standing presumption. Without pointing to any specific evidence of Congressional intent to rebut it, the court of appeals conferred upon the federal government for the first time a broad "class of perpetual rights" for suits brought in a representative capacity.

The court of appeals believed that its holding was compelled by this Court's decision in *Occidental Life Insur-*

ance Co. v. *Equal Employment Opportunity Commission*, 432 U.S. 355 (1977). But *Occidental Life* represents a narrow exception to the traditional rule and is rooted in the unique statutory scheme governing civil actions by the EEOC. It does not create a broad new rule applicable, as the court of appeals erroneously thought, to all government enforcement actions brought on behalf of third parties.

The Court in *Occidental Life* determined that application of state limitation periods to suits by the EEOC would "directly conflict with the timetable for administrative action expressly established [by Congress]." *Id.* at 369. The EEOC, which by statute is directed to settle disputes, "if possible, in an informal, noncoercive fashion," can bring a judicial enforcement proceeding only after it has exhausted a multi-step investigation and conciliation process. *Id.* at 368. As the Court noted, "[u]nlike the typical litigant against whom a statute of limitations might appropriately run, the EEOC is required by law to refrain from commencing a civil action until it has discharged its administrative duties." *Id.* Indeed, the EEOC's right to sue may not even mature until after the state limitation period has run. *Id.* at 369 & n.23.

The present case involves no similar inconsistency between the federal enforcement program and the application of state limitation periods. No statute or regulation requires DOE to delay the initiation of a judicial enforcement action during a period of investigation and attempted conciliation; nor is there any impediment to the prompt filing by the government of an action under Section 209 of the ESA. *See United States* v. *Exxon Corp.*, 470 F. Supp. 674 (D.D.C. 1979), *aff'd*, 616 F.2d 526 (TECA 1980). To the contrary, Section 209 authorizes the government to bring suit immediately, whenever a violation has occurred or is about to occur. Unlike the situation in *Occidental Life*, application of state statutes of limitations could not and would not "directly conflict"

with DOE's diligent prosecution of its enforcement responsibilities under Section 209.[2]

Rather than engaging in a careful analysis of the relevant statutory scheme or expressions of legislative intent, as this Court did in *Occidental Life*, the court of appeals reflexively extended to the Department of Energy the narrow exception created for the EEOC. Failing to recognize that *Occidental Life* was the exception and not the rule, the court of appeals improperly uprooted this Court's holding from the reasoning in which it was grounded.

In fact, the broad rule created by the court of appeals was implicitly rejected by this Court in *Occidental Life*. The Solicitor General there argued that the rule regarding the applicability of state statutes of limitations relates "only" to "private actions," that the "rule is otherwise when the federal government itself exercises a right to sue under a federal statute," and that "the federal government must be free to act without state interference." Brief for the EEOC at 30, 31. But the expansive rule advocated by the Solicitor General was irreconcilable with such long-standing precedent as *United States* v. *Beebe*, *supra*, and the Court pointedly declined to embrace it. The Court instead ruled narrowly, after a rigorous analysis of the statutory scheme, that unique circumstances justified special treatment for the EEOC. Now, however, the court of appeals has awarded the gov-

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[2] In *Occidental Life* the Court also noted that "[t]he absence of inflexible time limitations on the bringing of lawsuits will not . . . deprive defendants in Title VII civil actions of fundamental fairness or subject them to the surprise and prejudice that can result from the prosecution of stale claims . . . [because] the Title VII defendant is alerted to the possibility of an enforcement suit within 10 days after a charge has been filed." 432 U.S. at 372. No similar protection is available here. The Department of Energy's enforcement program contains no statutory or regulatory provision obliging the agency to alert a potential defendant in a timely fashion that it may be the target of a later enforcement action.

ernment what this Court purposely withheld—a "class of perpetual rights" broadly applicable to government enforcement actions brought on behalf of third parties.

The court of appeals asserted that the need for nationwide uniformity justifies freeing DOE from the constraint of varying state statutes of limitations. Pet. App. 7a. But the logic of that assertion proves too much. Because a federal agency could always claim that it would "be hampered by the various periods of limitations throughout the fifty states," *id.*, the court of appeals' approach would wholly displace the settled rule that, in the absence of a Congressionally specified limitations period, state statutes of limitations apply. *See, e.g., Board of Regents* v. *Tomanio, supra; UAW* v. *Hoosier Cardinal Corp., supra; United States* v. *Beebe, supra.* Like its unreasoned invocation of *Occidental Life*, the court of appeals' uniformity rationale creates a boundless exception that would swallow the general rule.

Although the court of appeals here failed to analyze whether the statutory scheme or expressions of Congressional intent directly conflict with the application of state statutes of limitations, it has done so in other cases involving private actions under the ESA. That analysis has led it to conclude correctly, for reasons equally applicable here, that state statutes of limitations govern private actions for damages under Section 210 of the ESA. *Ashland Oil Co.* v. *Union Oil Co.*, 567 F.2d 984 (TECA 1977), *cert. denied*, 435 U.S. 994 (1978); *Shell Oil Co.* v. *Nelson Oil Co.*, 627 F.2d 228, 236 (TECA), *cert. denied*, 449 U.S. 1022 (1980); *Colorado Petroleum Products Co.* v. *Husky Oil Co.*, 646 F.2d 555 (TECA 1981). In reaching that conclusion, the court of appeals reasoned that the ESA "contains no indication that expressed national policy is inconsistent with any fixed period of limitation borrowed from state law" and that the underlying statutory structure in no way suggests "that Congress intended no limitation provisions

to apply or that state statutes of limitations should not be looked to in accordance with the general rule." *Ashland Oil Co.* v. *Union Oil Co., supra*, 567 F.2d at 989.

That same reasoning should have controlled this case. By ignoring its own analysis in *Ashland*, however, the court of appeals has now created an anomaly. Even though state statutes of limitations apply to actions by private parties seeking damages under the ESA, actions filed by the government on behalf of such parties, according to the court of appeals, are subject to no limitation periods. The court of appeals advanced no reason why suits to vindicate the same rights and obtain the same relief should be time-barred in one case and not in the other. Nor did the court of appeals even suggest that Congress intended that a system of temporary price and allocation controls should bestow upon the government rights in perpetuity.

The court of appeals also relied on *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946), citing it for the broad proposition that "suits to enforce equitable rights created by federal law are not subject to state statutes of limitations, even if brought by a private party." Pet. App. 7a. The court of appeals' reliance on *Holmberg* is flawed in two fundamental respects. First, the government here is suing on behalf of third parties whose remedy is at law; as their representative, the government "is, of course, subject to the same rules of prescription as if [it] were in a court of law." *Bacon* v. *Howard*, 61 U.S. (20 How.) 22, 26 (1858). Under *Ashland Oil Co.* v. *Union Oil Co., supra*, those "same rules of prescription" are clear: the most analogous state statute of limitations applies. Second, the *Holmberg* rule is in fact limited to circumstances where "the *sole* remedy" for enforcement of a federal right is in equity. 327 U.S. at 395 (emphasis added). Since DOE's enforcement scheme contains concurrent legal and equitable remedies, the *Holmberg* rule

is inapplicable. *Cope* v. *Anderson*, 331 U.S. 461, 463-64 (1947); *Russell* v. *Todd*, 309 U.S. 280, 289 (1940).[3]

II. THE CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW OF SUBSTANTIAL INTEREST TO THE COURTS, GOVERNMENT AGENCIES, AND THE PUBLIC AND THUS DESERVES PLENARY REVIEW BY THIS COURT

The issue presented by this case is not whether the application of state statutes of limitations will hamper future efforts to ensure continuing compliance with an ongoing national allocation and pricing program. Petroleum allocation and price controls have been lifted, and the regulatory program is over. The issue instead is whether the government can postpone, without limitation, its decision to bring an action seeking monetary recoveries on behalf of third parties for an alleged past violation of the regulations. The court of appeals, by granting government enforcement personnel an open ticket, not only has repudiated 150 years of decisions by this Court and ignored the careful reasoning of *Occidental Life* but also has turned its back on the significant policies served by statutes of limitations.

"Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system." *Board of Re-*

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[3] The ESA quite plainly creates both legal and equitable rights. Aside from the ESA's functionally equivalent remedies for restitution under Section 209 and damages under Section 210, the government may seek civil and criminal penalties under Section 208 to achieve compliance. Further penalties may be sought under Section 5(a)(3) of the Emergency Petroleum Allocation Act (EPAA), 15 U.S.C. § 754(a)(3). Broad remedial order authority is also implicit in the EPAA, *Bonray Oil Co.* v. *Department of Energy*, 601 F.2d 1191 (TECA 1979), *aff'g* 472 F. Supp. 899, 902-04 (W.D. Okla. 1978), and explicit under Section 503 of the Department of Energy Organization Act, 42 U.S.C. § 7193. *See United States* v. *Exxon Corp.*, 616 F.2d 526 (TECA 1980), *aff'g* 479 F. Supp. 674, 680-83 (D.D.C. 1979).

gents v. *Tomanio*, *supra*, 446 U.S. at 487. Designed "to protect the citizens from stale and vexatious claims and to make an end to the possibility of litigation after the lapse of a reasonable time," *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 136 (1938), statutes of limitation "represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free from stale claims in time comes to prevail over the right to prosecute them.'" *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979), *quoting Order of Railway Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, 349 (1944). Moreover, such statutes serve the public interest by "protect[ing] defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *United States* v. *Kubrick*, *supra*, 444 U.S. at 117. By rejecting the traditional rule in the present case, the court of appeals has opened the door to the perpetual revival of stale claims that will be extremely difficult for firms to defend and for the courts to resolve.[4]

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[4] For example, a pivotal question in determining whether a firm properly implemented DOE's pricing regulations is how it classified its customers on the regulatory base date of May 15, 1973. Even though the events related to that issue occurred almost 10 years ago, a firm could at some undetermined future time be called upon, under the court of appeals' decision, to defend its 1973 classification. Changes in company personnel, loss of documentation, and faded memories that inevitably occur with the passage of time would jeopardize a firm's ability to reconstruct relevant events and company decisions, thereby impeding the defense and proper resolution of an enforcement action raising that issue.

The passage of time will give rise to other problems as well. The petroleum allocation and price regulations were a quickly constructed but pervasive and complex regulatory scheme. Much of the litigation spawned by those regulations has involved the government's efforts to enforce after-the-fact interpretations of

Nor are the problems raised by the decision below ones that will soon disappear because of the cessation of price and allocation controls. DOE officials have testified publicly that the agency intends to initiate, at some unspecified time in the future, hundreds of future enforcement actions with respect to the pre-decontrol period seeking monetary recoveries in the hundreds of millions of dollars.[8] The threat of interminable litigation is thus a real one.

The decision below gives rise to significant costs and dangers. The decision will spawn, for years to come, complicated regulatory litigation that will consume substantial time, energy, and resources of the federal courts and litigants. It will remove the agency's incentive to expedite its enforcement activities. It will burden firms with the expensive obligation, for the indeterminate future, of maintaining records documenting innumerable transactions occurring as far back as the early 1970's. It will permit potential enforcement claims to live on indefinitely as "time bombs" to be detonated at the whim of changing governmental officials or political adminis-

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matters that were purportedly implicit in the regulations. In those cases, the courts have found it necessary to permit deposition and document discovery of the agency and its regulatory draftsmen and policymakers to evaluate whether the after-the-fact interpretations are consistent with the agency's original regulatory intent and its contemporaneous construction of the regulations during the relevant time period. *See, e.g., Standard Oil Co.* v. *Department of Energy*, 596 F.2d 1029 (TECA 1978). With the passage of time, that task is made much more difficult as documents are lost or destroyed, agency personnel leave government service, and memories fade.

[8] For example, in April 1982 Congressional testimony, Rayburn Hanzlik, the Administrator of DOE's enforcement arm, the Economic Regulatory Administration, stated that the agency was preparing about 700 cases for litigation involving, in the aggregate, claims of almost $9 billion. *See* R. Hanzlik, Administrator for Economic Regulation, Department of Energy, Statement before the Subcommittee on Environment, Energy and National Resources of the House Committee on Government Operations (April 19, 1982).

trations. And, by clouding the horizon with the threat of future liabilities, it will seriously hamper the ability of many firms to formulate and implement plans for future development and expansion.

This case does not involve a narrow regulatory issue peculiarly within the expertise of the Temporary Emergency Court of Appeals. It presents a broad issue of federal law that turns on the proper application of decisions of this Court. Nevertheless, because the court below has exclusive jurisdiction over DOE enforcement matters, parties affected by the decision have no hope of correcting the court's error through subsequent litigation in other circuits. Resolution of the important issue presented here cannot be productively deferred. We urge the Court to grant plenary review now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: May 17, 1982